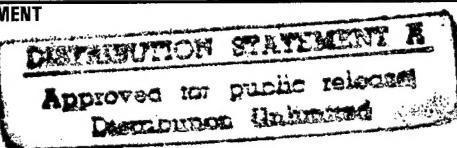


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**Environmental Audit: Have We Met The Enemy?**

as of August 6, 1996

By

Joseph Lee Miller

B.A. May 1980, Creighton University  
J.D. May 1984, Creighton University

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Arnold W. Reitze, Jr.  
Professor of Law

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# **ENVIRONMENTAL AUDITING: HAVE WE MET THE ENEMY?**

*"The unexamined life is not worth living."*

Socrates

## **I. Introduction.**

### ***A. Opening.***

Within eight days this past June, the battle lines were drawn. The Environmental Protection Agency (EPA) finally and unmistakably declared war on states with environmental audit laws that seek to promote compliance through grants of privilege, immunity, or both. Choosing as its weapon the Clean Air Act (CAA) operating permit program,<sup>1</sup> EPA took the strategic position that such audit laws weaken the enforcement authority of these states to the point of jeopardizing final approval by EPA of programs under Title V of the act. Since the CAA requires states to adopt federally approved operating permit programs or face specified sanctions,<sup>2</sup> this action may have started the mother of all environmental battles.

On June 17, 1996, EPA launched the first attack by proposing interim approval and, in the alternative, disapproval of Idaho's operating permit program due, in part, to the effect of that state's environmental audit statute on its enforcement obligations under Title V.<sup>3</sup> EPA followed with another salvo against Michigan on June 24, 1996 when the

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<sup>1</sup> CAA, Subchapter V, 42 U.S.C. 7661 *et seq.*

<sup>2</sup> CAA § 502(d), 42 U.S.C. 7661a(d).

<sup>3</sup> 61 Fed. Reg. 30,570, at 30,574.

agency proposed interim approval of that state's Title V program. The notice specified that Michigan must narrow the privilege and immunity provisions of its audit law to receive full approval.<sup>4</sup> The next day, EPA expanded its theater of operations to include Texas. When the agency granted final interim approval for the Texas operating permit program, it noted that the state's environmental audit law could prohibit the state from imposing appropriate civil and criminal penalties under the CAA and may negatively impact disclosures by imposing sanctions against whistleblowers. EPA announced that it may be unable to grant final approval delegating the Title V program to Texas, since the effect of the audit law may impact the state's enforcement authority as required by the CAA.<sup>5</sup>

In all three actions, EPA left open the possibility of a truce if the state could demonstrate to the agency's satisfaction that the audit law did not impermissibly interfere with the state's enforcement authority. On the other hand, EPA revealed its big gun, the mandatory sanctions of the CAA, which the agency declared its intent to employ should the states fail to change their laws or to demonstrate the adequacy of their enforcement authority.<sup>6</sup>

When taking action on the Michigan and Texas permit programs, EPA outlined the requirements in the CAA for delegation of the Title V program. The agency observed that interim approval lasted for two years and could not be extended. Under the CAA, following final interim approval, a state must submit a complete corrective program for full approval six months before the interim approval expires. Failure to do so starts an

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<sup>4</sup> 61 Fed. Reg. 32,391, at 32,397.

<sup>5</sup> 61 Fed. Reg. 32,691, at 32,697.

eighteen month clock for mandatory sanctions under CAA section 179(b), which includes withholding federal transportation funds or increasing the ratio of emissions offset reductions. Once imposed these sanctions continue until EPA determines the state has corrected the deficiency in its state operating permit program.<sup>7</sup>

The battle between EPA and states with audit laws will heat up in 1997 when the interim approval status already granted to several of these states expires.<sup>8</sup> Will EPA hold the line? Will the states surrender? Time will tell, but while the fighting continues it may serve everyone's best interests to assess the conflict by examining the respective position of the combatants. This thesis proposes to set forth the order of battle for the warring parties, which requires a thorough and exhaustive analysis of the approaches by the federal and state governments. As its strategic conclusion, this thesis recommends taking more time to study the effectiveness of the methods adopted before the war expands to include programs delegated to the states under the Clean Water Act (CWA)<sup>9</sup> and the Resource Conservation and Recovery Act (RCRA)<sup>10</sup>. In the end, the real issue remains what approach best protects the American people and their environment, not whether the states or EPA should be declared victorious.

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<sup>6</sup> *Id.*, at 32,699.

<sup>7</sup> *Id.*, See *supra* note 4, at 32,397.

<sup>8</sup> 40 C.F.R. pt. 70, App. A (1996) (Arkansas, Interim approval expires Oct. 8, 1997; Colorado, Interim approval expires Feb. 24, 1997; Illinois, Interim approval expires Mar. 7, 1997; Indiana, Interim approval expires Dec. 14, 1997; Kentucky, Interim approval expires, Dec. 14, 1997; Minnesota, Interim approval expires Jul. 16, 1997; and Wyoming, Interim approval expires Feb. 19, 1997).

<sup>9</sup> See CWA § 402(b), 33 U.S.C. § 1342(b).

<sup>10</sup> See RCRA § 3006, 42 U.S.C. § 6926(b).

## *B. Overview.*

The discussion begins with describing the nature of the environmental audit, defining its characteristics, examining its necessity, and explaining its weakness. Next, this paper analyzes current approaches for encouraging auditing and protecting the results of a self-evaluation. In addition to safeguards available under common law, some states offer privilege and/or immunity as protection for those who police themselves,<sup>11</sup> while EPA has chosen to provide penalty mitigation.<sup>12</sup> To review the treatment of audits at the federal level requires scrutinizing the policy of the EPA, as well as the approach taken by the Department of Justice (DOJ) and the applicability of the U.S. Federal Sentencing Guidelines. In addition, the 104th Congress has bills pending before it that govern environmental auditing.<sup>13</sup>

After examining the federal approach, this paper details the initiatives adopted by state governments that offer refuge to entities conducting environmental audits. Although the state statutes contain some unique provisions, they fall largely within the parameters of providing privileged treatment to audit results and offering some form of immunity for those entities that voluntarily disclose their findings. Several of these statutes require the state regulatory agency to evaluate the success of the law in promoting compliance and to report its findings to the legislature, which may then extend the act, if it contains a sunset provision, or modify or repeal the act.

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<sup>11</sup> *State Lawmakers Weigh Merits of Environmental Audit Bills*, Daily Env't Rep. (BNA), Apr. 18, 1996, at B-1.

<sup>12</sup> EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995).

<sup>13</sup> See S. 582, 104th Cong., 1st Sess. (1995); H.R. 1047, 104th Cong., 1st Sess. (1995).

This thesis concludes by noting that all states with environmental audit legislation risk disapproval and, perhaps, reversion of regulatory programs delegated to them by the federal government.<sup>14</sup> Before resorting to such strategic weapons, EPA should allow more time to study the effectiveness of the different methods implemented by the states and compare these findings with the results of its own Final Policy before making a final determination on which method works better. This paper identifies the statutory and regulatory provisions that allow EPA to meet the deadlines imposed by the CAA and still provide the opportunity to gather more empirical evidence on which approach works best. Finally, this paper argues that Congressional action may be necessary for the EPA and the states to avoid a war perhaps more detrimental than beneficial to our environment.

## **II. Environmental Audits.**

### ***A. Definition.***

EPA has consistently used the same description of an environmental audit since 1986. The agency defines an “environmental audit” as a “systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.”<sup>15</sup> EPA maintained this definition for its latest policy, “Incentives for Self-Policing: Discovery, Disclosure, Correction and

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<sup>14</sup> *State Privilege-Immunity laws For Audits Could Hurt Program Delegation, Official Says*, 26 Env’t Rep. 2253 (BNA) Mar. 29, 1996; Cheryl Hogue, *Enforcement: State Audit Legislation Could Cause Programs To Revert To EPA, Browner Says*, Daily Env’t Rep (BNA) Mar. 28, 1995, at A-6.

<sup>15</sup> EPA, Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, at 25,006 (1986).

Prevention of Violations" (hereinafter "Final Policy").<sup>16</sup> Incidentally, the 1986 policy statement includes "private firms and public agencies with facilities subject to environmental regulation" within the definition of "regulated entities".<sup>17</sup> Not all of the state statutes apply to all governmental entities.

As an example of how state laws define "environmental audit", Oregon describes it to mean "a voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under ORS chapter 465, 466, 468, 468A, 468B, 761, or 767, or the federal, regional or local counterpart or extension of such statutes, or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes."<sup>18</sup>

Some commentators describe an environmental audit as the "systematic examination of a facility, product line, or corporation as a whole ... by measuring compliance with environmental norms and then reporting the results, complete with a set of corrective actions that are necessary for the facility, product line, or corporation to achieve compliance."<sup>19</sup> Other terms used in lieu of "environmental audit" include "process audit", "self-audit", self-evaluative analysis", and "compliance audit".<sup>20</sup>

For purposes of this discussion, "environmental audit" does not encompass the "transactional audit", which pertains to the acquisition process. Buyers and tenants

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<sup>16</sup> EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, at 66,710 (1995).

<sup>17</sup> *Id.*

<sup>18</sup> OR. REV. STAT. § 468.963(6)(a) (1993).

<sup>19</sup> James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 Seton Hall Legis. J. 119, 119 (1994); Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 Harv. Envtl. L. Rev. 365, 365-66 (1992).

conduct this type of audit as a matter of “due diligence” in conjunction with a pre-closing investigation.<sup>21</sup> The importance of a “transactional audit” relates to the ability to establish an “innocent purchaser” defense under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>22</sup> One commentator refers to this as an “external audit” to distinguish it from an “internal audit”, which assesses compliance.<sup>23</sup>

### ***B. Historical Beginning.***

As the definitions above suggest, environmental auditing serves the purpose of assessing a regulated entity’s level of compliance with the various environmental standards and determining the measures necessary to achieve compliance. In other words, the process identifies problems in satisfying environmental requirements, aids in the design and implementation of the appropriate remedy, and helps avoid future noncompliance.<sup>24</sup> Environmental audits may also reduce the likelihood of a violation by detecting the areas of operations posing the greatest risk of noncompliance.<sup>25</sup>

Identifying environmental self-audits as the first line of defense to protect a company from criminal enforcement, some commentators list the following benefits:

1. Verifying the environmental compliance of regulated facilities and evaluating the effectiveness of environmental management systems;
2. Detecting potential problems and minimizing pollution that does occur;

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<sup>20</sup> James R. Arnold, Disclosure of Environmental Liabilities to Government Agencies and Third Parties, CA47 ALI-ABA 381 (Oct. 12, 1995); James R. Arnold, Compliance Auditing: Not a “Safe Harbor” but a “Course Out of Harms Way”, 797 PLI/Corp. 511 (1992).

<sup>21</sup> *Id.*

<sup>22</sup> See CERCLA §§ 101(35)(B) and 107(b)(3); 42 U.S.C. §§ 9601(35)(B) and 9607(b)(3).

<sup>23</sup> John C. Buckley, *Considering Environmental Law*, 1 U. Balt. J. Envtl. L. 1 (Summer, 1991)

<sup>24</sup> I. Leo Motiuk & William C. Behrndt, III, The Environmental Audit: Can It Help?, 459 PLI/Lit 561, 561 (Apr.-May, 1993).

<sup>25</sup> Michael A. Chernekoff, Environmental Compliance: Assessment and Mitigation, C732 ALI-ABA 393, 406 (Jan. 16, 1992).

3. Prioritizing compliance concerns and providing a method for allocating capital to address environmental problems;
4. Generating company protocols that help facilities better manage themselves and allow headquarters to monitor more effectively the performance of plant operations;
5. Providing a forum for employees to report information concerning violations;
6. Enhancing the company's political and public relations; and
7. Anticipating and responding to emergency situations.<sup>26</sup>

The complexity of myriad environmental laws and regulations necessitate periodic review of a regulated entity's facilities and operations.<sup>27</sup> The laws have become so complicated that companies find it extremely difficult to maintain compliance during daily operations without systematically examining applicable standards and routinely measuring performance against these rules.

### **C. Current Program.**

Various standards have evolved that outline the characteristics of an effective environmental auditing program. EPA specified the following general elements as likely components:

1. Explicit top management support for environmental auditing and commitment to follow-up on audit findings;
2. An environmental auditing function independent of audited activities;
3. Adequate team staffing and auditor training;

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<sup>26</sup> John F. Cooney, Judson W. Starr, Joseph G. Block, Thomas J. Kelly Jr., Andrew R. Herrup, Valerie K. Mann, & Gregory Braker, *Criminal Enforcement of Environmental Laws: Part III - From Investigation to Sentencing and Beyond*, 25 Envtl. L. Rep. 10600 (Nov., 1995).

<sup>27</sup> EPA, Docket #C94-01, E-47.

4. Explicit audit program objectives, scope, resources, and frequency;
5. A process which collects, analyzes, interprets and documents information sufficient, reliable, relevant and useful to achieving audit objectives;
6. A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation; and
7. A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.<sup>28</sup>

A professional organization, the Environmental Auditing Roundtable (EAR), established minimum criteria for its members when they conduct environmental, health, and safety audits.<sup>29</sup> The standards specify requirements for systematic plans and procedures, clear and precise objectives, planned and supervised fieldwork, audit documentation, clear and appropriate reporting, and audit quality control and assurance measures.<sup>30</sup> In addition, the EAR set criteria for auditor proficiency, professionalism, and independence.<sup>31</sup>

Another source of guidance for developing an environmental auditing program should become available shortly. The International Organization for Standardization is expected to finalize ISO 14000, which will outline environmental audit policy criteria, planning procedures, and specific standards for conducting audits.<sup>32</sup> ISO 14000,CD 14001, a draft standard, lists the essential components of an environmental management

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<sup>28</sup> *Supra* note 15, at 25,009.

<sup>29</sup> David T. Buente Jr., Thomas C. Green, James L. Connaughton, Developing and Implementing an Environmental Corporate Compliance Program, C868 ALI-ABA 85, 97 (Oct. 7, 1993).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Ridgway M. Hall Jr. & Kristine A. Tockman, International Corporate Environmental Compliance and Auditing Programs, 25 Envtl. L. Rep. 10395 (Aug. 1995).

system.<sup>33</sup> Organizations and auditors can find directions on performing self-evaluations in ISO 14010, Guidelines for Environmental Auditing: General Principles of Environmental Auditing.<sup>34</sup> While the draft of ISO 14011/1 sets out standards for assessing environmental management systems, the draft of ISO 14012 specifies qualification criteria for the auditors themselves.<sup>35</sup>

#### ***D. The Other Use of an Environmental Audit.***

At first blush, the environmental audit appears to be an excellent tool to achieve compliance with environmental laws and regulations, which should ensure better protection of our environment. However, regulated entities have come to fear the use of environmental audits as evidence against them. These entities face the dilemma of not performing an audit, which means problems that might be corrected go undetected, or conducting a self-evaluation, which could uncover a violation that regulators may not otherwise discover. Industry understands its internal operations better than the regulators and can utilize more resources to audit their compliance. If this leads to finding more violations, then entities may face more punishment than they would without the audit. If regulated entities must report the violations or the regulators have free access to audit reports, then the audits become a liability.

Such a Hobson's choice led regulated entities in search of lawful means to protect the results of environmental auditing. Industry focused primarily on the Attorney-Client privilege or the Work-Product doctrine. It has also explored other privileges, such as the

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

self-critical analysis or self-evaluative privilege. Efforts have recently turned toward a statutory environmental audit privilege. Before examining the latter thoroughly, this discussion briefly details the success, or lack thereof, of the former.

### ***E. Legal Protection for Audit Results.***

#### **1. Attorney-Client Privilege.**

The attorney-client privilege shields, as confidential communications, statements made by a client to an attorney for the purpose of obtaining legal advice.<sup>36</sup> The party asserting the privilege bears the burden of proof to show the privilege applies to particular documents or communications.<sup>37</sup> The U.S. Supreme Court has limited the privilege to “only those disclosures ... necessary to obtain informed legal advice ... which might not have been made absent the privilege.”<sup>38</sup> Relating strictly to communications, the privilege may not protect the underlying facts from discovery.<sup>39</sup>

Courts have long held that the privilege applies only when:

1. The party asserting the privilege is or had sought to become a client;
2. The person to whom the disclosure was made, or that person’s subordinates, is a member of the bar of a court and was acting in the role of a lawyer in connection with the communication;
3. The communication concerns facts the client related to the attorney without the presence of third parties for the purpose of obtaining primarily either a legal opinion, legal services, or assistance in some legal proceeding, but not for the purpose of committing a crime or a tort; and

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<sup>36</sup> In re Grand Jury Investigation, 974 F.2d 1068, 1070 (9th Cir. 1992).

<sup>37</sup> *Id.*, at 1071.

<sup>38</sup> Fisher v. United States, 425 U.S. 391, 403 (1976).

<sup>39</sup> United State v. El Paso Co., 682 F.2d 530 (5th Cir. 1982), reh’g denied, 688 F.2d 840 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984).

4. The privilege has been asserted and not waived by the client.<sup>40</sup>

Applying this test in light of the opinions referenced above, a federal district judge upheld the privilege, finding that the attorney-client privilege protects environmental audit memoranda generated by a company's employees, which are prepared for attorneys in an effort to seek a legal opinion regarding compliance with relevant laws and regulations.<sup>41</sup> However, if the audit identifies ongoing violations, it may lose any protection since it contains evidence of an ongoing crime.<sup>42</sup>

Using the attorney-client privilege to protect environmental audits requires that counsel specifically request an audit be conducted, limiting communications between auditors and employees without counsel present, marking as privileged and addressing all written materials from auditors to counsel, providing counsel strict control over the audit report, and that counsel directly participate in the audit to a significant degree.<sup>43</sup> In this regard, counsel must act in the role of attorney providing legal advice, rather than as a business advisor.<sup>44</sup> In *United States v. Chevron U.S.A., Inc.*, the court rejected application of the attorney-client privilege because the attorney performing the analysis acted in the capacity of a business advisor.

As a corollary matter, courts may strictly construe the legal advice requirement. Finding that an environmental consultant provided services directly to the company in preparing a waste management plan and not to the attorney for the purpose of assisting the attorney in rendering legal advice, a federal district judge ruled that the consultant

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<sup>40</sup> *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

<sup>41</sup> *Olen Properties Corp. v. Sheldahl, Inc.*, 24 Envtl. L. Rep. 20936, No. CV 91-9446-WDK (Mcx) (C.D. Cal. Apr. 12, 1994).

<sup>42</sup> *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985).

was not the agent of the law firm.<sup>45</sup> Therefore, the attorney-client privilege did not apply to communications between the company and the consultant.<sup>46</sup> In that case, the law firm's primary connection to the expert consultant was limited to paying fees out of an escrow account.<sup>47</sup>

Another concern with relying on the attorney-client privilege is how easily it can be waived. Discussing audit with personnel that do not have a strict need to know may risk waiver. Likewise, disclosing the audit to regulators may waive the privilege vis-à-vis other parties. Some courts refuse to grant selective waiver protection, which upholds the privilege in cases where the party asserting it has divulged the confidential communication to government officials.<sup>48</sup> This becomes particularly important if counsel divulges information gleaned from an audit to regulators during settlement negotiations and a court later determines that disclosure waives the privilege.

In addition, a party may lose the privilege by placing the contents of an environmental audit "at issue" in a proceeding. The Third Circuit Court of Appeals has held that the attorney-client privilege does not apply if the party asserting the privilege advances a claim or defense, an attorney-client communication is relevant to an element of that claim or defense, and the need for the evidence outweighs the potential for chilling such communication.<sup>49</sup> This unpublished decision involved an affirmative defense by the party asserting the privilege that it did not expect its activities might contaminate the

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<sup>43</sup> Cooney, *et al.*, *supra* note 26.

<sup>44</sup> United States v. Chevron U.S.A., Inc., (E.D.Pa. Oct. 16, 1989)

<sup>45</sup> In re Grand Jury Matter, 147 F.R.D. 82 (E.D. Penn. Dec 31, 1992).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Westinghouse Electric Corp. v. The Republic of the Philippines, 951 F.2d 1414 (3rd Cir. 1991); *But see* Diversified Indus., Inc. v. Meredith, 572 F2d 596, 611 (8th Cir. 1977).

environment. As a form of waiver, the “at issue” exception to the attorney-client privilege arises when a party takes action which makes the confidential communication relevant.<sup>50</sup>

Because of these constraints, attempting to squeeze the audit into the attorney-client privilege becomes onerous and reduces the effectiveness of the audit. If a regulated entity cannot discuss the results of auditing with its employees out of fear this will waive the privilege, then the company loses the benefit of bringing the employees into the compliance mindset that auditing provides.

## 2. Work-Product Doctrine.

Rule 26(b)(3) of the Federal Rules of Civil Procedure codifies the work-product doctrine.<sup>51</sup> To fall within the protection of this privilege, a party must show that the materials consist of a document or other tangible item, which was prepared in anticipation of litigation by or for a party to the action or its representative.<sup>52</sup>

If counsel conducts an environmental audit to prepare for litigation, the evaluation may qualify for the safeguards of the work-product doctrine.<sup>53</sup> This doctrine provides a

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<sup>49</sup> Koppers Company Inc. v. Aetna Casualty & Surety Co. et al., No. 94-3146, 3rd Cir. (Apr. 26, 1994).

<sup>50</sup> Remington Arms Co. v. Liberty Mutual Ins. Co., 142 F.R.D. 408, 412 (D. Del. 1992)

<sup>51</sup> FED. R. CIV. P. 26(b)(3) in pertinent part specifies: [A] party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

<sup>52</sup> Vermont Gas Sys., Inc. v. U.S. Fidelity & Guaranty Co., 151 F.R.D. 268, 275 (D. Vt. 1993).

<sup>53</sup> Matter of Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 279 (10th Cir. 1983).

zone of protection free from discovery, so the attorney can prepare the client's case.<sup>54</sup>

Protecting oral statements made by witnesses to counsel and materials drafted by investigators performing under the attorney's guidance, the work-product doctrine insulates notes, memoranda, and correspondence related to the mental impressions and legal theories of the attorney.<sup>55</sup>

Since the work-product doctrine shields materials prepared in anticipation of litigation, it may not apply to routine environmental audits performed to assist management in complying with environmental laws. Furthermore, where the prosecution demonstrates a compelling need, the court may order disclosure of the audit report despite the work-product doctrine.<sup>56</sup> For example, a federal district court decided the privilege did not cover environmental test results concerning soil contamination.<sup>57</sup> The court justified its ruling on grounds that the materials contained relevant facts as opposed to counsel's thought processes or mental impressions and, furthermore, that changed site conditions made it impossible for the opponent to perform similar tests.<sup>58</sup> Likewise, the privilege does not cover an audit conducted to comply with a consent order embodying a settlement with EPA because it was not performed in anticipation of litigation.<sup>59</sup>

In one sense, the work-product doctrine appears broader in coverage than the attorney-client privilege.<sup>60</sup> The former applies to any document prepared in anticipation

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<sup>54</sup> Hickman v. Taylor, 329 U.S. 495 (1947); FED. R. CIV. P., Rule 26(b)(3), 28 U.S.C.A.; Jay A. Brozost, The Corporate Counsel's Response to the Knock on the Door, C496 ALI-ABA 159, at 171, (Apr. 19, 1990).

<sup>55</sup> *Id.*, Brozost, at 172.

<sup>56</sup> In re Grand Jury Subpoena Duces Tecum, 599 F.2d 504, 511 (2d Cir. 1979).

<sup>57</sup> Horan v. Sun Co., Inc., 152 F.R.D. 437 (D. R.I. 1993).

<sup>58</sup> *Id.*

<sup>59</sup> Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471 (D. Colo. 1992).

<sup>60</sup> United States v. Nobles, 422 U.S. 225, 238 n. 11 (1975).

of litigation by or for the attorney, whereas the latter protects only confidential communications between the attorney and the client.<sup>61</sup> In addition, only the client holds the attorney-client privilege, while either the attorney or the client can assert the work-product protection.<sup>62</sup> On the other hand, the attorney-client privilege provides more absolute protection since it is not subject to the compelling need exception.<sup>63</sup>

### 3. Self-Evaluative Privilege.

In *Reichhold Chemicals, Inc. v. Textron, Inc.*, a federal district court held that a party was “entitled to qualified privilege for retrospective analysis of past conduct, practices and occurrences, and resulting environmental consequences … [as] to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of cause and effect of past pollution …”<sup>64</sup> Rule 501, Federal Rules of Evidence, authorizes federal courts to adopt new common law privileges, when it “promotes sufficiently important interests to outweigh the need for probative evidence.”<sup>65</sup> The court noted that such power should not be exercised expansively.<sup>66</sup>

Adopting the self-critical analysis privilege for an environmental audit, Judge Vinson observed that it allowed “individuals and businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation.”<sup>67</sup> He reasoned that critical self-

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<sup>61</sup> See *supra* note 54, Brozost.

<sup>62</sup> *Id.*

<sup>63</sup> Judson W. Starr, Avoiding the Criminal Process, C496 ALI-ABA 335, 352 (Apr. 19, 1990).

<sup>64</sup> *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527 (N.D. Fla. 1994).

<sup>65</sup> *Id.*, at 526 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

<sup>66</sup> *Id.* (citing *University of Pa. V. E.E.O.C.* 493 U.S. 182, 189 (1990)).

<sup>67</sup> *Id.*, at 524.

analysis advances the compelling public interest in observance of the law.<sup>68</sup> Since pollution seriously endangers public health, the court found a strong public interest in promoting voluntary detection and remediation of industrial pollution.<sup>69</sup> These interests outweigh the interests of private litigants seeking to discover minimally relevant, but potentially highly prejudicial , evidence.<sup>70</sup>

The court in *Reichhold* applied a four part test to determine whether the self-critical analysis privilege would protect retrospective analysis. The criteria require: (1) information generated by a critical self-evaluation performed by the party seeking the privilege; (2) a strong public interest in preserving the free flow of the particular type of information sought; (3) allowing discovery would curtail the flow of this sort of information; and (4) the party prepared the document expecting it to remain confidential and has, in fact, kept it confidential.<sup>71</sup> Emphasizing the qualified nature of the privilege for “retrospective analysis of past conduct, practices, and occurrences”, the court pointed out that a showing of extraordinary circumstances or special needs can overcome the privilege.<sup>72</sup>

Judge Vinson noted in *Reichhold* that courts have not universally acknowledged the self-critical analysis privilege.<sup>73</sup> Prior to that decision, another federal district court rejected the “self-evaluative” privilege for documents relating to alleged CWA

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, at 526.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (citing *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992)).

<sup>72</sup> *Id.*, at 527.

<sup>73</sup> *Id.*, at 525.

violations.<sup>74</sup> That case demonstrates that the self-critical evaluation privilege does not apply to information sought by government officials.

After *Reichhold*, the issue of recognizing the self-critical analysis arose in *Louisiana Envtl. Action Network, Inc. v. Evans Ind., Inc.*, where that court refused to adopt it. The court found no grounds to believe the potential for discovery would inhibit such evaluations.<sup>75</sup> Quoting the plaintiff's brief, the court noted, “[t]he consequences of failure to comply with state and federal environmental laws and regulations - including the possibility of criminal sentences, substantial civil penalties, debarment from entering into government contracts and public disapproval - make it essential that corporations constantly evaluate their compliance with those laws and regulations.<sup>76</sup> Judge Duplantier, noting that EPA had issued its penalty mitigation policy, remained unconvinced that such environmental audits were always conducted with the expectation of confidentiality.<sup>77</sup>

Even when a court recognizes the self-critical evaluation privilege, circumstances may override the protection, as *Reichhold* observed. One federal district court ruled,

[w]hile this privilege has been recognized in some circumstances, it is not absolute. Where the need for this information is substantial and disclosure would have little effect on self-analysis, discovery has been compelled. The purpose for the existence of the privilege must at all times be kept in mind when evaluating its application: the critical self-analysis privilege exists entirely as a public policy concern; it is not personal to the holder. Thus, the privilege may be punctured by a showing of particularized need that outweighs the public interest in confidentiality.<sup>78</sup>

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<sup>74</sup> United States v. Dexter, 132 F.R.D. 8 (D. Conn. 1990).

<sup>75</sup> *Louisiana Envtl. Action Network, Inc. v. Evans Ind., Inc.*, 1996 WL 325588 (E.D. La. 1996) (No. CIV. A. 95-3002 Jun. 11, 1996).

<sup>76</sup> *Id.*, at \*2.

<sup>77</sup> *Id.*

<sup>78</sup> *Todd v. South Jersey Hosp. System*, 152 F.R.D. 676, 683 (D. N.J. 1993).

In that case, the court balanced the availability of the information from other sources, the extent of harm to a litigant due to any unavailability, and the possible prejudice suffered by the party conducting the investigation.<sup>79</sup>

Taken together the attorney-client privilege, the attorney work-product doctrine, and the self-critical analysis privilege provide some measure of protection for environmental audit reports. However, these shields are penetrable, which exposes regulated entities to the danger of memorializing evidence damaging to their interests. This situation, coupled with the lack of any regulatory protection from EPA, resulted in state legislatures taking the initiative to provide statutory protection. Since EPA has issued policies regarding environmental audits, this paper will examine those measures, as well as other federal efforts, before turning to state audit statutes.

### **III. Environmental Audit Policy and Law at the Federal Level.**

#### ***A. EPA Policy Evolution.***

In December 1995, the Environmental Protection Agency (EPA) issued its Final Policy that rests on the twin pillars of penalty mitigation and refraining from criminal referral for entities voluntarily disclosing noncompliance.<sup>80</sup> In addition, the Final Policy restated EPA's position of generally not requesting audit reports.<sup>81</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> EPA, *supra* note 12.

<sup>81</sup> *Id.*, at 66,706.

## 1. 1986 Policy.

In November, 1983, the chief of EPA's Regulatory Reform Staff raised the issue of whether the agency should adopt a policy commitment not to seek environmental audit reports.<sup>82</sup> Mr. Levin was responding to a suggestion that the self-evaluative privilege well suited environmental auditing.<sup>83</sup> EPA published a policy statement in November, 1985, as interim guidance, which for the first time announced that EPA would not routinely request environmental audit reports.<sup>84</sup> This notice solicited comments and stated its intention to evaluate implementation of this policy to determine whether it met the goal of encouraging more environmental audits.<sup>85</sup> Ultimately, the interim policy led to a revised, final policy statement, signed by the Administrator on June 28, 1986 (hereinafter the "1986 Policy").<sup>86</sup>

Faced with limited resources and the mandate to protect the environment, EPA must have recognized that strong deterrence alone will not ensure compliance. In the 1986 Policy, the agency encouraged environmental auditing simply by inviting the regulated community to join in the effort.<sup>87</sup> It expressed the belief that auditing leads to greater compliance.<sup>88</sup>

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<sup>82</sup> Michael H. Levin, *An EPA Response on Confidentiality in Environmental Auditing*, 13 Envtl. L. Rep. 10346 (Nov. 1983).

<sup>83</sup> *Id.*

<sup>84</sup> EPA, Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (1985).

<sup>85</sup> *Id.*

<sup>86</sup> EPA, Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986)

<sup>87</sup> *Id.*, at 25,006 ("While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.... EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance.

Despite its broad statutory authority to request information relevant to the compliance status of regulated entities, EPA acknowledged that routine “requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted.”<sup>89</sup> EPA offered assurances that it would not regularly seek environmental audit documents and clarified its position on seeking audit reports by stating it would exercise such authority on “a case-by-case basis” where these reports are “needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation.”<sup>90</sup> The policy statement added, “EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency.”<sup>91</sup>

In response to a comment that EPA should offer incentives for environmental auditing, the agency stated,

Based on earlier comments received from industry, EPA believes most companies would not support or participate in an ‘incentives-based’ environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies’ adoption of environmental auditing programs - the

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Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices”).

<sup>89</sup> *Id.*, at 25,006 (“Environmental auditing has developed for sound business reason, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers’ attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves”).

<sup>90</sup> *Id.*, at 25,007.

<sup>91</sup> *Id.*

<sup>91</sup> *Id.* (“Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation.”)

'incentives' most frequently mentioned in this context - are fraught with legal and policy obstacles.<sup>92</sup>

Consequently, EPA declined to offer any incentives and offered no guarantees that any information obtained through an audit could not be used against the regulated entity. However, EPA hinted that auditing should result in fewer inspections and favorable consideration during enforcement actions for good faith efforts to correct problems.<sup>93</sup>

Another important portion of the 1986 Policy centers on its relationship to state and local regulatory agencies. Recognizing that states have independent jurisdiction over regulated entities, EPA encouraged them to follow its approach for the sake of consistency.<sup>94</sup> The agency expressly stated it did not intend to preempt or preclude states from developing alternative methods for handling environmental audits.<sup>95</sup> However, it urged the states to follow these principles in developing audit policies:

1. Regardless of whether an audit generates the information, regulated entities must still report or record compliance information required under existing statutes and regulations;
2. Regulatory agencies lack authority to promise forgoing or limiting enforcement action in exchange for entities using environmental auditing systems;
3. Compliance performance and environmental results should determine inspection priorities for regulatory agencies;
4. Regulatory agencies must continue to satisfy minimum program requirements; and
5. Regulatory agencies should refrain from prescribing the exact form or structure for an auditing program.<sup>96</sup>

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<sup>92</sup> *Id.*, at 25,004.

<sup>93</sup> *Id.*, at 25,007; see also, James R. Moore & David Dabroski, *EPA Environmental Auditing Policy and Federal Criminal Enforcement*, C617 ALI-ABA 207, 210 (1991).

<sup>94</sup> *Id.*, at 25,008.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

According to EPA, an “effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improved.”<sup>97</sup>

## 2. Beginnings of Change.

In 1994, after states began passing environmental audit protection legislation, EPA started reassessing its policy to determine if new incentives were necessary to “encourage environmental auditing and voluntary disclosure and prompt correction of violations uncovered in environmental audits.”<sup>98</sup> When addressing the National Association of Attorneys General on March 22, 1994, EPA Administrator Browner heard criticisms of the agency’s policy on environmental audits.<sup>99</sup> One attorney general told the administrator, “Businesses are afraid of doing environmental audits for fear they will be hurt by audits by uncovering damaging information that we will use against them.”<sup>100</sup> When asked for her views on the need for a limited privilege to protect such audits, Administrator Browner reportedly stressed her support for environmental auditing and said that the administration was analyzing the issue but provided few specifics.<sup>101</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> EPA, Restatement of Policies Related to Environmental Auditing 59 Fed. Reg. 38,455 (1994); *see also* Letter from Carol M. Browner, EPA Administrator, to Rep. Tom Delay, U.S. House of Representatives (Dec. 23, 1994) (on file with author).

<sup>99</sup> *Enforcement: State Attorneys Quiz Browner on Audits, Federal Facilities, Criminal Investigations*, Daily Env’t Rep. (BNA) Mar. 23, 1994 (1994 DEN 55 d13).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

In an internal memo dated May 13, 1994, Administrator Browner requested that the EPA Office of Enforcement and Compliance Assurance (OECA) reassess the current policy concerning environmental audits.<sup>102</sup> The agency determined that any possible change must be "informed by fact" and characterized the review process as "an empirical information-gathering effort" into the "perceived problems relating to auditing, self-evaluation, and disclosure ... "<sup>103</sup> Based on the Administrator's request, OECA planned various actions for the summer of 1994.<sup>104</sup>

On July 27-28, 1994, EPA conducted a public hearing in Washington, D.C. to elicit comments on whether it should change the existing policy and to review environmental audit privileges enacted and proposed by state legislatures.<sup>105</sup> The two day meeting provided a forum for all interested parties, including industry representatives, environmentalists, and state officials, to debate the benefits and uses of environmental audits in the presence of EPA officials reviewing the 1986 policy.<sup>106</sup>

Prior to the meeting, EPA published a notice entitled "Restatement of Policies Related to Environmental Auditing" (hereinafter "1994 Restatement").<sup>107</sup> While the document did not change policy, it did summarize the 1986 Policy and updated the

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<sup>102</sup> *Enforcement: EPA Asks States to Put Off Legislation Making Audits Privileged Until Review Done*, Daily Env't Rep. (BNA), Jun. 17, 1994.

<sup>103</sup> EPA, Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38, 455 (Jul. 28, 1994).

<sup>104</sup> *Id.* at 38,456. First, EPA scheduled a public meeting in July to discuss the issue. Next, EPA solicited proposals for pilot projects under the Environmental Leadership Program to include methods for auditing. Third, it encouraged the private sector to survey auditing practices to determine the effect of enforcement policies on environmental self-evaluations. Finally, the agency published a restatement of its auditing and related policies.

<sup>105</sup> *Environmental Audits: State Audit Privilege Laws, Enforcement Impact Undergoing EPA Review*, Daily Env't Rep. (BNA) July 14, 1994, at A-3.

<sup>106</sup> *Enforcement: EPA, DOJ Hear Debate on Protecting Environmental Audits From Disclosure*, Daily Env't Rep. (BNA), Jul. 28, 1994, at AA-1.

<sup>107</sup> See *supra* note 103.

agency's approach to environmental auditing in relation to other pertinent policies.<sup>108</sup> In reference to four states having recently enacted audit privilege statutes, it stated, "EPA has consistently opposed this approach, principally because of the risk of weakening State enforcement programs, the imposition of unnecessary transaction costs and delays in enforcement actions, and the potential increase in the number of situations requiring the expenditure of scarce Agency resources, including the "overfiling" of State enforcement actions.<sup>109</sup> EPA encouraged the states considering adopting audit privilege legislation to participate in the review process before taking action and the states with such laws to "present documentary justification" for that approach at the meeting or in written comments.<sup>110</sup>

In the 1994 Restatement, EPA noted three significant evolutionary steps in criminal enforcement policies covering the use of self-evaluations. The first two developments were the DOJ guidance issued July 1, 1991, entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" and the "Final Draft Environmental Sentencing Guidelines" published by the Federal Sentencing Guidelines Commission on November 11, 1993.<sup>111</sup> This paper will discuss these approaches *infra*.

The third development mentioned in the 1994 Restatement concerned the guidance document entitled, "The Exercise of Investigative Discretion" issued by EPA's

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<sup>108</sup> *Id.*, at 38,455.

<sup>109</sup> *Id.*, at 38,459.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, at 38,458.

Director of Criminal Enforcement on January 12, 1994.<sup>112</sup> To distinguish cases meriting criminal investigation, this document established specific criteria. Regarding entities that audit environmental compliance, the paper states:

Corporate culpability may be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the non-compliance and correct any harm done. On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction. When self-auditing has been conducted (followed up by prompt remediation of the non-compliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remediated as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal resources.<sup>113</sup>

As an aside, two months after the July meeting, the nominee for the Deputy Administrator position at EPA, Frederic Hanson, commented that the federal government must offer incentives to encourage businesses to conduct environmental audits.<sup>114</sup> This remark represented the beginning of a potential shift away from the 1986 Policy.

As part of the policy review process, EPA held a focus group meeting at the agency's Region IX office on January 19, 1995 to gather views from fifty invited stakeholders.<sup>115</sup> At that time EPA laid out a "generic series of options", which included approaches borrowed from state audit privilege laws.<sup>116</sup> These options included: assume the current policy suffices and change nothing, clarify when EPA will seek audits and

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<sup>112</sup> *Id.*, at 38,458-459.

<sup>113</sup> *Id.*

<sup>114</sup> *EPA: Federal Incentives Need to Encourage Environmental Audits, Deputy Nominee Says*, Daily Env't Rep. (BNA), Sep. 28, 1994, at A-3 (Mr. Hanson served as director of the Oregon Department of Environmental Quality prior to being confirmed as EPA Deputy Administrator).

<sup>115</sup> Amy Phillips, *Environmental Audits: EPA Holds Focus Group Meeting; Outlines Options for Audit Policy*, Daily Env't Rep. (BNA) Jan. 20, 1995 (1995 DEN 13 d9).

how they will be used, establish a policy providing for penalty mitigation or immunity under certain conditions, treat an audit as an affirmative defense, require mandatory auditing, offer preferential treatment to companies that do more than comply, or recognize an audit privilege.<sup>117</sup> The next day EPA followed this meeting with an “open mike” session where the general public could offer comments.<sup>118</sup>

### 3. 1995 Interim Policy.

After conducting the policy review process and consulting with the Regional Offices and DOJ, EPA issued the “Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement” on April 3, 1995 (hereinafter the “Interim Policy”).<sup>119</sup> This statement announced and requested comments on an interim policy that offered “incentives for regulated entities that conduct voluntary compliance evaluations and also disclose and correct violations.”<sup>120</sup> As incentives, the Interim Policy identified the elimination or substantial reduction of the gravity component of civil penalties and halting referral of cases for criminal prosecution under specified conditions.<sup>121</sup> EPA proclaimed that while it was offering these inducements, it planned to continue discussing the policy with interested parties and consider further adjustments.<sup>122</sup>

When introducing the Interim Policy, EPA acknowledged the necessity of voluntary cooperation of regulated entities for the agency to achieve its goal of obtaining

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> EPA, Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

compliance with federal laws that protect public health and our environment.<sup>123</sup> From that perspective, the Interim Policy represents part of the Clinton Administration's effort at regulatory reform. At a print shop in Arlington, Virginia, on March 16, 1995, President Clinton spoke about "Reinventing Government". In reference to the printer and the environment, he said, "Here's a guy who's tried to do right, wants to do more right and is afraid that if he does it, he'll be punished for doing it. It really is true that often in the government no good deed goes unpunished."<sup>124</sup> President Clinton later remarked:

Today, we are ordering a government-wide policy. Enforcers will be given the authority to waive up to 100 percent of punitive fines for small businesses so that a business person who acts in good faith can put his energy into fixing the problem, not fighting with the regulator. In other words, if they want to spend the fine money fixing the problem, better they should keep it and fix the problem than give it to the government.

Similarly, regulators will be given the discretion to waive fines for small businesses altogether if it's a first-time violation, and the firms quickly and sincerely move to correct the problem. Let me be clear: These changes will not be an excuse for violating criminal laws, they won't be an amnesty for businesses that harm public health, they won't enable people to undermine the safety of the public while their competitors play by the rules. But we will stop playing 'gotcha' with decent, honest

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The White House, Office of the Press Secretary, "Remarks of President at REGO Event 3/16/95", 1995 WL 109514, at \*2 (White House); *see also*, White House, Office of the Press Secretary, "Directive on Penalties Waiver and Reports Reduction 4/21/95", 1995 WL 235931, at \*1-2 (White House):

"On March 16, I announced that the Administration would implement new policies to give compliance officials more flexibility in dealing with small business and to cut back on paperwork. These Government-wide policies, as well as the specific agency actions I announced, are part of this Administration's continuing commitment to sensible regulatory reform. ... To the extent permitted by law, each agency shall use its discretion to modify the penalties for small businesses in the following situations. Agencies shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question. For those violations that may take longer to correct than the period set by the agency, the agency shall use its enforcement discretion to waive up to 100 percent of the financial penalties if the amount waived are used to bring the entity into compliance. The provisions [of this paragraph] shall apply only where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment."

businesspeople who want to be good citizens - compliance, not punishment, should be our objective.<sup>125</sup>

Paraphrasing the President's words, this philosophy simply amounts to protecting people, not bureaucracy; promoting results, not rules; getting action, not rhetoric; and, wherever possible, embracing common sense - an approach which confounds enemies and elates friends.<sup>126</sup>

While the President's remarks focus on small business, the Interim Policy applied incentives across the spectrum of regulated entities, provided they voluntarily discovered, disclosed, and corrected violations.<sup>127</sup> This policy outlines three separate inducements to encourage more environmental auditing:

First, the Agency will completely eliminate gravity-based (or "punitive") penalties for companies or public agencies that voluntarily identify, disclose and correct violations according to the conditions outlined in this policy. EPA will also reduce punitive penalties by up to 75% for companies that meet most, but not all, of these conditions. Second. EPA will not recommend to the Department of Justice that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so long as no serious actual harm has occurred. Finally, the Agency will not request voluntary environmental audits to trigger enforcement investigations.<sup>128</sup>

The conditions referenced above include voluntary self-policing, voluntary disclosure, prompt correction, remediation of substantial endangerment, remediation of harm and prevention of repeat violations, no lack of appropriate preventive measures, and cooperation with EPA.<sup>129</sup> The agency added that it may require regulated entities to enter

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<sup>125</sup> *Id.*, "Remarks of President at REGO Event 3/16/95" at \*4-5.

<sup>126</sup> *Id.*, at \*2.

<sup>127</sup> See *supra* note 119, at 16,875.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*, at 16,877. EPA described these conditions as follows:

into written agreements, administrative consent orders or judicial consent decrees to satisfy these conditions.<sup>130</sup>

Along with these stipulations, the Interim Policy contains several qualifications. Regardless of whether a regulated entity satisfies all of the prerequisites, EPA reserved the option of collecting “full civil penalties for criminal conduct, violations that present an imminent and substantial endangerment or result in serious actual harm, or repeat violations.”<sup>131</sup> The agency also retained complete discretion to “level the playing field” by recovering any economic benefit gained as a result of noncompliance, unless it was determined insignificant.<sup>132</sup>

To avoid referral for criminal charges, the violation must not have demonstrated “(1) a prevalent corporate management philosophy or practice that concealed or condoned

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1. Voluntary self-policing. The regulated entity discovers a violation through a voluntary environmental audit or voluntary self-evaluation appropriate to the size and nature of the regulated entity; and
2. Voluntary disclosure. The regulated entity fully and voluntarily discloses the violation in writing to all appropriate federal, state and local agencies as soon as it is discovered (including a reasonable time to determine that a violation exists), and prior to (1) the commencement of a federal, state or local agency inspection, investigation or information request; (2) notice of a citizen suit; (3) legal complaint by a third party; or (4) the regulated entity’s knowledge that the discovery of the violation by a regulatory agency or third party was imminent; and
3. Prompt correction. The regulated entity corrects the violation either within 60 days of discovering the violation or, if more time is needed, as expeditiously as practicable; and
4. Remediation of imminent and substantial endangerment. The regulated entity expeditiously remedies any condition that it has created or may create an imminent and substantial endangerment to human health or the environment; and
5. Remediation of harm and prevention of repeat violation. The regulated entity implements appropriate measures to remedy any environmental harm due to the violation and to prevent a recurrence of the violation; and
6. No lack of appropriate preventive measures. The violation does not indicate that the regulated entity has failed to take appropriate steps to avoid repeat or recurring violation; and
7. Cooperation. The regulated entity cooperates as required by EPA and provides such information as is reasonably necessary and required by EPA to determine applicability of this policy. Cooperation may include providing all requested documents and access to employees and assistance in any further investigations into the violation.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, at 16,875.

environmental violations; (2) high-level corporate officials' or managers' conscious involvement in or willful blindness to the violation; or (3) serious actual harm to human health or the environment.”<sup>133</sup> Furthermore, EPA refused to apply the policy to individual managers or employees.<sup>134</sup>

Concerning routine requests for audit reports, the agency noted that when it has “reason to believe a violation has been committed, EPA may seek through an investigation or enforcement action any information relevant to identifying violations or determining liability or extent of harm.”<sup>135</sup>

In the Interim Policy, EPA claimed its approach to incentives offered “a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up the litigation costs and create an atmosphere of distrust between regulators, industry and local communities.”<sup>136</sup> According to the agency, immunity provides an economic advantage to lawbreakers over law-abiding competitors.<sup>137</sup> Granting privileged audits inhibits public participation in environmental decision making, carries the risk of denying access to critical factual information, and could shield bad actors.<sup>138</sup> The agency also asserted that privileges and immunity may result in increased litigation to determine the extent of protection, which would further

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<sup>132</sup> *Id.*, at 16,877

<sup>133</sup> *Id.*, at 16,878.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*, (EPA further noted that its policy imposed no limitations on the right of regulated entities to assert common law privileges, such as attorney-client or work-product.)

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

burden the judicial system, consume government resources, and possibly preclude quick responses to environmental emergencies.<sup>139</sup>

When outlining the consequences of the Interim Policy for states, EPA noted that maintaining national consistency impacted the desirability of allowing creative approaches by the states.<sup>140</sup> The agency announced it would “scrutinize enforcement more closely in states with audit privilege and/or immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining:

1. information needed to establish criminal liability;
2. facts needed to establish the nature and extent of a violation;
3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit;
4. appropriate sanctions or penalties for criminal conduct and repeat violations; or
5. prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.”<sup>141</sup>

To ensure satisfaction of federal requirements, EPA promised to work with states to address any provisions of state audit laws that affect these concerns.

As an internal guideline, the Interim Policy did not bind EPA. The agency authorized deviations from the policy, as long as personnel documented the reasons.<sup>142</sup> In addition, EPA expressly stated the policy did not create any enforceable right and that it

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

was subject to change at any time without public notice.<sup>143</sup> The Assistant Administrator for Enforcement and Compliance Assurance, rather than the EPA Administrator, signed the Interim Policy.<sup>144</sup>

### ***B. EPA Finalizes Self-Policing Incentives.***

#### **1. The Development Process.**

During the process of developing the Interim Policy, EPA established the Environmental Auditing Policy Compliance public docket, Docket #C-94-01, which served as a repository for all of the comments submitted to the agency.<sup>145</sup> After publishing the Interim Policy, EPA continued receiving comments from government agencies, industry, environmental interest groups, and concerned citizens.<sup>146</sup> On December 22, 1995, the agency promulgated its Final Policy, which became effective in January, 1996.<sup>147</sup> Before finalizing the audit policy, 378 separate entries were added to the docket.<sup>148</sup> Appendix A, an extract of the Matrix Summary of Public Comments prepared by EPA,<sup>149</sup> presents a table depicting the most frequent comments.

To produce the Final Policy, EPA gained insight from the comments submitted to the Docket, ideas discussed at five days of dialogue hosted by the American Bar

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<sup>142</sup> *Id.*, at 16,879.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> EPA, Environmental Auditing Policy Compliance, Docket No. C-94-01 (on file at EPA Waterside Mall, Washington D.C.).

<sup>146</sup> *Id.*

<sup>147</sup> EPA, *supra* note 12.

<sup>148</sup> EPA, *supra* note 145, Index. EPA received 216 of these submissions after issuing the Interim Policy and before issuing the Final Policy. Of these entries, 176 comments expressly referred to the Interim Policy.

<sup>149</sup> *Id.*, Docket Comment VIII-A-85.

Association in 1995, the practical experience of implementing the Interim Policy, and the results of a survey conducted by Price-Waterhouse LLP.<sup>150</sup> Of the 369 responses analyzed in this survey, seventy-five percent indicated that the company already had an environmental auditing program.<sup>151</sup> Appendix B contains a compilation of key findings made by Price-Waterhouse.

## 2. Final Policy Provisions.

The Final Policy centers on mitigating penalties for violations uncovered during environmental audits and refraining from referring such cases to the Justice Department for criminal prosecution. Maintaining its previous position, EPA stated it would not routinely request audit reports during inspections. The key incentive offered by EPA amounts to waiving the "gravity" based element of enforcement penalties for violations detected during audits or as a result of "due diligence".<sup>152</sup> To reap these benefits, the

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<sup>150</sup> EPA, *supra* note 12, at 66,706-707.

<sup>151</sup> EPA, *supra* note 145, Price Waterhouse LLP, The Voluntary Environmental Audit Survey of U.S. Business, Docket Comment VIII-A-76, at 1. Sponsored by the Compliance Management and Policy Group, Coalition for Improved Environmental Audits, Environmental Auditing Roundtable, BF Goodrich Company, Eli Lilly & Company, and Texas Instruments, the Voluntary Environmental Audit Survey of U.S. Business was conducted in early 1995 with the following objectives:

1. To survey industry's perceptions of environmental auditing practices, and the incentives and disincentives to performing voluntary environmental audits.
2. To contact a broad range of companies of varying sizes and within various industry sectors regarding their auditing practices. The survey process would therefore include companies that do not have auditing practices.
3. To produce a survey report by March 1995 that will be available to interested members of the public and will be submitted as part of the public comment process in the development of the U.S. Environmental Protection Agency's environmental auditing and enforcement policy.
4. To provide benchmark data on the practice of environmental auditing.

EPA had encouraged this survey as one of the four actions initiated in 1994 when reviewing its policy. Although the agency vaguely referred to the Survey in the Interim Policy, it specifically mentions certain findings in the Final Policy.

<sup>152</sup> EPA, *supra* note 12, at 66,711. The policy defines "Due diligence" as encompassing "the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

regulated entity must voluntarily discover and disclose, as well as promptly correct, any violations.<sup>153</sup> These requirements were included in nine specific conditions, which had to be met before the policy applied.<sup>154</sup> Even if the regulated entity does not discover the

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- a. Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;
- b. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
- c. Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
- d. Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;
- e. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
- f. Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* The nine conditions contained in the Final Policy are explained at 66,711-712 as follows:

- 1. Systematic Discovery: The violation was discovered through:
  - a. an environmental audit; or
  - b. an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.
- 2. Voluntary Discovery: The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to :
  - a. emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
  - b. violation of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;
  - c. violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.
- 3. Prompt Disclosure: The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;
- 4. Discovery and Disclosure Independent of Government or Third Party Plaintiff: The violation must also be identified and disclosed by the regulated entity prior to:

violation through an environmental audit and it cannot document due diligence, EPA will reduce the gravity-based penalty by seventy-five percent for a violation that is voluntarily detected, promptly disclosed, and expeditiously corrected, provided all other conditions are satisfied.<sup>155</sup>

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- a. the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency or an information request to the regulated entity;
- b. notice of a citizen suit;
- c. the filing of a complaint by a third party;
- d. the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
- e. imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation: The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;
6. Prevent Recurrence: The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;
7. No Repeat Violations: The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:
  - a. any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice violation, conviction or plea agreement; or
  - b. any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.
8. Other Violations Excluded: The violation is not one which (I) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.
9. Cooperation: The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

<sup>155</sup> *Id.*, at 66,711.

To fully escape the gravity component, the regulated entity had to perform an environmental audit<sup>156</sup> or have a systematic program that satisfied the criteria for “due diligence”.<sup>157</sup> Any violation discovered voluntarily had to be promptly disclosed.<sup>158</sup> Such discovery and disclosure must be independent of any government or third party action.<sup>159</sup> Next, the company had to correct the violation quickly and remediate any harm.<sup>160</sup> The response must be sufficient to prevent the recurrence of the violation.<sup>161</sup> In addition, the policy would not apply to repeated violations, nor to certain specified violations, such as when high level officials are consciously involved.<sup>162</sup> Finally, the regulated entity must cooperate fully with EPA to ensure the action resulted in compliance and provide information necessary to determine the applicability of the policy.<sup>163</sup>

In its “Final Policy”, EPA specified certain exceptions to which the incentives would not apply. These include certain criminal actions, specifically those committed by individuals.<sup>164</sup> The Final Policy explicitly excludes individuals from the incentive that EPA will not refer violations discovered during self-policing to the Justice Department for criminal prosecution.<sup>165</sup> In addition, the policy does not apply to violations that cause serious actual harm or may have presented a substantial and imminent danger to public

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<sup>156</sup> *Id.*, at 66,710 (defined as, “a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.”).

<sup>157</sup> *Id.*, at 66,710-66,711.

<sup>158</sup> *Id.*, at 66,711.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*, at 66,712. EPA will not recommend criminal prosecution when the violation does not “demonstrate or involve: i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or ii) high-level corporate officials’ or managers’ conscious involvement in, or willful blindness to, the violations.”

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*, at 66,711.

health or the environment.<sup>166</sup> Repeat violations within certain time periods also deny the entity any benefits of the policy.<sup>167</sup>

As the third incentive to encourage environmental audits, EPA stated it will not request or use an audit report to commence a civil or criminal investigation of an entity.<sup>168</sup> In other words, the agency will not demand an environmental audit report while conducting a routine inspection. However, it may seek any information relevant to detecting violations or determining the extent of harm or liability, when EPA has independent reason to believe that a violation has occurred.<sup>169</sup>

Notably, to preserve a “level playing field” so that violators do not obtain a competitive advantage over regulated entities that comply, EPA retained complete discretion to recoup any economic benefit gained as a result of noncompliance.<sup>170</sup> However, if the violation does not deserve any penalty in the agency’s opinion because of the insignificant amount of any economic benefit, EPA may waive the entire penalty, provided all other conditions are met.

EPA also declined to adopt incentives for self-policing as part of a regulation.<sup>171</sup> Therefore, the policy is not binding, which leaves it open to widespread criticism of uncertainty and unpredictability.<sup>172</sup> Although the “Final Policy” omitted language found in the “Interim Policy” which allowed it broad discretion to deviate from the policy, EPA still limited the policy to serving as guidance for prosecutorial discretion. It expressly

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*, at 66,712.

<sup>171</sup> *Id.*, at 66,710.

provides, that the policy is not final agency action and "does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties."<sup>173</sup>

EPA expressly reserved its authority to "take necessary actions to protect public health or the environment by enforcing against violations of federal law."<sup>174</sup> Therefore, the agency can "overfile" in cases where EPA deems state action inadequate. EPA also stated:

[it] will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations.<sup>175</sup>

EPA significantly toned down this provision from what appeared in the "Interim Policy". Apparently in response to several comments, EPA deleted its not so veiled threat to increase inspections in such states and scrutinize enforcement programs more closely.<sup>176</sup>

While the threatening language does not appear in the final version of the policy, it does not follow necessarily that, as a practical matter, EPA would not pay particular attention to states with audit laws. At various times, EPA has stated that state audit laws granting immunity from penalties to regulated entities which detect violations by auditing

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<sup>172</sup> Michael Moore, *Final Policy On Voluntary Audits Draws Praise, Criticism*, Daily Env't Rep. (BNA), Jan. 12, 1996.

<sup>173</sup> EPA, *supra* note 12, at 66,712.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> EPA, *supra* note 119, at 16,878.

could lead to reversion of some state-delegated environmental programs to EPA.<sup>177</sup> Administrator Browner informed the National Association of Attorneys General that some state audit legislation would cause programs ranging from solid waste management to waste water discharge permits that are delegated to states to revert back to national control by EPA.<sup>178</sup> On the other hand, in response to a question at the 1996 annual meeting of the National Governors' Association of whether EPA would draft model legislation for states, Administrator Browner replied "we would be more than happy to look at model legislation and to work with states."<sup>179</sup>

Another provision of the Final Policy warrants particular attention in relation to this thesis. In a section titled "Public Accountability", EPA promised to complete within three years a review of the effectiveness of its Final Policy. The study, which the agency will make available to the public, will measure the extent to which the policy encourages:

1. Changes in compliance behavior within the regulated community, including improved compliance rates;
2. Prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;
3. Improving environmental performance, and promoting public disclosure; and
4. Consistency among state programs that provide incentives for voluntary compliance.

In stark contrast with the Interim Policy, the Final Policy generally applies to any violation discovered voluntarily, regardless of whether any law requires the regulated

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<sup>177</sup> Cheryl Hogue, Enforcement: State Audit Legislation Could Cause Programs to Revert to EPA, Browner Says, Daily Env't Rep. (BNA), Mar. 28, 1995, at A-6.

<sup>178</sup> *Id.*

<sup>179</sup> Katherine M. Stimmel, EPA: Browner Pledges to Work with Governors on Model Environmental Audit Legislation, Daily Env't Rep. (BNA), Feb. 6, 1996 (1996 DEN 24 d3).

entity to report the violation.<sup>180</sup> Several comments received by the agency suggested that excluding mandatory disclosures would, in effect, "swallow the rule."<sup>181</sup> Indeed, due to the numerous reporting requirements of environmental laws, EPA had to expand the scope of its policy to avoid severely limiting incentives for self-auditing.<sup>182</sup> This change along with the inclusion of due diligence programs and the specification of a ten day or shorter period for disclosure are the most significant variations from the Interim Policy.

On June 3, 1996, EPA issued its Final Policy on Compliance Incentives for Small Business.<sup>183</sup> Through adopting this policy, the agency intends to foster environmental compliance among small businesses<sup>184</sup> by offering incentives to participate in compliance assistance programs or to perform environmental audits followed by prompt correction of any violations.<sup>185</sup> The Small Business Policy sets forth certain conditions that the business must meet for EPA to refrain from initiating an enforcement action to impose civil penalties or to mitigate civil penalties. To qualify, small businesses must make good efforts to comply with environmental laws by receiving on-site compliance assistance<sup>186</sup> or promptly disclosing the findings of a voluntarily conducted environmental audit.<sup>187</sup> Additional criteria require that the violation:

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<sup>180</sup> EPA, *supra* note 12, at 66,708.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> EPA, Interim (sic) Policy on Compliance Incentives for Small Businesses, June 3, 1996, 61 Fed. Reg. 27,948.

<sup>184</sup> *Id.*, at 27,985. "Small business" is defined as "a person, corporation, partnership, or other entity who employs 100 or fewer individuals (across all facilities and operations owned by the entity).

<sup>185</sup> *Id.*, at 27,984.

<sup>186</sup> *Id.*, at 27,986. "Compliance assistance" is defined as "information or assistance provided by EPA, a State or another government agency or government supported entity to help the regulated community comply with legally mandated environmental requirements. Compliance assistance does not include enforcement inspections or enforcement actions."

<sup>187</sup> *Id.*, at 27,984.

1. Is the small business's first violation of the particular requirement;
2. Does not involve criminal conduct;
3. Has not and is not causing a significant health, safety or environmental threat or harm; and
4. Is remedied within the specified corrections period.<sup>188</sup>

EPA will waive the entire gravity component of the civil penalty, but may seek the full amount of any economic benefit, if the small business obtained a significant economic advantage over its competitors or if the correction takes longer than the specified period, even if all of the remaining conditions are satisfied.<sup>189</sup>

In comparison with the Final Policy, the Small Business Policy seems more conciliatory to the states. Recognizing that states are "partners in enforcement and compliance assurance", EPA announced that it "will defer to state actions in delegated or approved programs that are generally consistent with the criteria set forth in this [p]olicy."<sup>190</sup> This policy employs a similar "Public Accountability" provision, specifying that the agency will conduct a three year study of the effectiveness of the policy in promoting compliance among small businesses and will, subsequently, make the review available to the public.<sup>191</sup>

### ***C. DOJ Policy.***

While debating the 1990 Amendments to the CAA, the Conference Committee considered adding a statutory defense shielding corporations and their employees from

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*, at 27,986.

<sup>190</sup> *Id.*, at 27,987.

<sup>191</sup> *Id.*

criminal liability when a voluntary environmental audit detected a violation and the corporation corrected it expeditiously.<sup>192</sup> Neither the Senate nor the House bill contained the necessary provision, so the proposal was not adopted. However, the Conference Committee did include a "Statement of Managers" proclaiming the view that the Executive agencies should use prosecutorial discretion concerning audits in the following manner:

Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter refrain from using the information obtained by a person in the course of a voluntarily initiated environmental audit against such person to prove the knowledge element of a violation of this Act if – (1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused the correction of such violation as quickly as possible, and (3) in the case of a violation that presented an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment.<sup>193</sup>

Although the "Statement of Managers" does not constitute a law, the Department of Justice addressed the concerns by issuing a DOJ Policy Guidance Document on July 1, 1991 (hereinafter "DOJ Policy").<sup>194</sup> In this policy, DOJ encourages self-auditing, self-policing and voluntary reporting of environmental violations by regulated entities. It treats these actions as mitigating factors when exercising criminal enforcement discretion. To avoid creating a disincentive for critical self-policing and voluntary disclosure, the

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<sup>192</sup> Thomas C. Green, David T. Buente Jr., Angus Macbeth, *U.S. Sentencing Commission Organizational Guidelines and U.S. Department of Justice Policy Statement on Environmental Criminal Prosecution*, C778 ALI-ABA 501, 511 (Oct. 29, 1992).

<sup>193</sup> *Id.*

department prescribed guidance for federal prosecutors to follow when deciding whether to bring a criminal prosecution for an environmental violation. In addition to ensuring that prosecutorial discretion was exercised consistently nationwide, the policy provides the regulated community with a sense of how the department should respond to voluntary disclosure of self-identified violations.<sup>195</sup>

The DOJ Policy lists the following factors for federal prosecutors to consider when deciding “whether and how to prosecute”:

1. Voluntary Disclosure - the entity’s voluntary, timely and complete disclosure of the matter under investigation, specifically whether the disclosure substantially aided the department’s investigation and whether the regulatory authority was already aware of the noncompliance.
2. Cooperation - the degree and timeliness of cooperation by the entity, particularly its willingness to make available all relevant information, including the results of any internal or external evaluation and the names of potential witnesses.
3. Preventive Measures and Compliance Programs - the existence and scope of any systematic, intensive, and comprehensive environmental compliance program, such as an environmental audit.
4. Additional Factors Which May Be Relevant - the pervasiveness of noncompliance, the administration of an effective internal disciplinary action program, and the extent of subsequent compliance efforts.

Although the policy emphasizes these factors, this list is not a definitive checklist and prosecutors should consider all relevant factors.<sup>196</sup> Furthermore, the policy specifically

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<sup>194</sup> DOJ, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator , 21 Envtl. L. Rep. 35399.

<sup>195</sup> *Id.*, at Part I.

<sup>196</sup> *Id.*, at Part II.

excludes disclosures already required by law, regulation, or permit from consideration as "voluntary."<sup>197</sup> The last provision differs from EPA's Final Policy.

When evaluating the regulated entity's compliance program, prosecutors should ask the following questions:

- a. Was there a strong institutional policy to comply with all environmental requirements?
- b. Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring?
- c. Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance?
- d. Were there procedures and safeguards to ensure the integrity of any audit conducted?
- e. Did the audit evaluate all sources of pollution (ie., all media), including the possibility of cross-media transfers of pollutants?
- f. Were the auditor's recommendations implemented in a timely fashion?
- g. Were adequate resources committed to the auditing program and to implementing its recommendations?
- h. Was environmental compliance a standard by which employee and corporate departmental performance was judged?<sup>198</sup>

To illustrate the application of the factors identified in the policy, DOJ described numerous hypothetical examples. To explain the nature of the policy, the department noted that the criteria outlined above served only as internal guidance to DOJ attorneys. The factors do not supplant prosecutorial discretion; rather they provide a guide to the effective use of limited enforcement resources. Therefore, the policy does not "create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor [does it] in any way limit the lawful litigative prerogatives,

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<sup>197</sup> *Id.*, at Part II.A.

<sup>198</sup> *Id.*, at Part II.C.

including civil enforcement actions, of the Department of Justice or the Environmental Protection Agency.”<sup>199</sup>

Conditioning favorable treatment on the basis of disclosure presents a dilemma for entities that seek the benefits of the DOJ Policy. By voluntarily reporting a violation discovered through an environmental audit, the entity may effectively waive any privilege claim under the attorney-client and work-product doctrines.<sup>200</sup> A regulated entity, which avoids a criminal enforcement action by DOJ, risks an adverse ruling when asserting these common law privileges in any third party toxic tort, nuisance, or other action.

Another potential danger for regulated entities lurks in the nature of the DOJ policy itself. Since it does not bind prosecutors to refrain from initiating criminal prosecutions, the policy does not foreclose the adverse use of audit results.<sup>201</sup> Exposure to this peril bears considerable attention in light of the department’s assertion that it is “unlikely that any one factor will be dispositive in any given case.”<sup>202</sup>

Although some commentators believe DOJ’s promise to exercise prosecutorial discretion rings hollow,<sup>203</sup> the Assistant Attorney General for the Environment and Natural Resources Division, Lois Schiffer, continues to stand by the policy. Ms. Schiffer reportedly told the National Association of Manufacturers that DOJ will not prosecute

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<sup>199</sup> *Id.*, at Part IV.

<sup>200</sup> See *supra* note 19, Hunt & Wilkins, at 397.

<sup>201</sup> *Id.*, at 399-400.

<sup>202</sup> *Supra* note 194, at Part II.

<sup>203</sup> See *supra* note 19, Hunt & Wilkins, at 400; see also Joseph G. Block, Good First Step or Hidden Dagger? The Effect Of Voluntary Disclosure on DOJ Prosecutorial Discretion, C776 ALI-ABA 103, 106, Sep. 17, 1992 (criticizes DOJ policy for not identifying to whom violations should be disclosed, not describing the types of violations that qualify for leniency, and not establishing specific standards for distinguishing which violations deserve criminal prosecution instead of civil or administrative disposition. The author asks whether the policy is a “sign of growing maturity in environmental enforcement or simply a case of honey in their mouths but swords in their hearts.”).

violations of environmental statutes discovered by self-audits, provided the entity reports the violations to the regulators and corrects the problem.<sup>204</sup>

After EPA released its Final Policy, DOJ announced its support for the agency. In a congratulatory letter, Ms. Schiffer endorsed the expansion of incentives for self-auditing.<sup>205</sup> In the letter, she wrote that the department had no current plans to change the 1991 DOJ Policy. Indeed, the Assistant Attorney General identified the following measures demonstrating DOJ's commitment to fostering voluntary compliance and disclosure"

1. The Department generally will not seek an environmental audit from a regulated entity prior to receipt of other information suggesting that the entity has committed violations of environmental law. However, once an investigation is begun on the basis of independent information of violations, the Department seeks all relevant information, including audit reports.
2. The Department views effective programs to prevent and detect violations of law, as well as self-reporting, cooperation and acceptance of responsibility, as mitigating factors in the sentencing phase of environmental criminal cases against corporations.
3. The Department supports the use of EPA's Incentives policy, in conjunction with other applicable settlement policies, in the settlement of civil environmental enforcement actions to which they may apply.
4. The Department has its own small business policy that, subject to limited exceptions, waives all civil penalties for small businesses that participate in

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<sup>204</sup> Susan Bruninga, *Enforcement: DOJ, EPA to go Easy On Violations Found Through Self Audits, Schiffer Tells NAM*, Daily Env't Rep. (BNA), Apr. 28, 1995 (1995 DEN 82 d7). See also, Cheryl Hogue, *DOJ Environment Chief Discusses Audits, Superfund, Goals*, Daily Env't Rep. (BNA) Sep. 7, 1995 (1995 DEN 173 d15)(In an interview on September 7, 1995, Ms. Schiffer referred to the 1991 DOJ Policy and stated, "In fact, the practice has been if companies come forward with that information, we don't prosecute the company criminally." Later in the interview, the Assistant Attorney General commented, "... we have made it very clear to our attorneys that they are not to open a case with an audit. Basically, they have to have some other basis for going forward with civil or criminal enforcement ... Of course, once they have that information that is part of normal investigations, they can seek an audit. But they won't open a case based on an audit. We've been very clear about that.")

<sup>205</sup> EPA, *supra* note 145, Docket No. VIII-A-80, Jan. 31, 1996.

and act promptly to remedy violations discovered in a compliance assistance program.<sup>206</sup>

The letter acknowledges that DOJ worked with EPA to develop the Final Policy.

In addition, the correspondence notes that the department, like EPA, vigorously opposes state and federal legislation granting evidentiary privileges or immunity for "polluters that perform environmental audits ..." <sup>207</sup> Unlike EPA, the department has no special guidance for prosecutors in states with environmental audit laws, at least it did not in 1994 when Ms. Schiffer was asked the question at an ALI-ABA conference.<sup>208</sup>

#### ***D. Federal Sentencing Guidelines.***

Yet another area of federal law has addressed the impact of environmental auditing on punishment meted out for violations voluntarily discovered. On November 16, 1993, the United States Sentencing Commission Advisory Group on Environmental Sanctions issued the Draft Corporate Sentencing Guidelines For Environmental Violations.<sup>209</sup> Similar to the other federal sentencing guidelines for organizations, the basic approach requires determining the "primary offense level" for the violation, which is adjusted by "culpability factors" composed of "aggravating factors" and "mitigating factors"; then determining the final organizational fine by applying the "fine calculation"

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> BNA, *Enforcement: Knowing Endangerment Cases Top Priority Of FBI Environmental Crimes Investigations*, Oct. 21, 1994 (1994 DEN 202 d3).

<sup>209</sup> BNA, Draft Corporate Sentencing Guidelines For Environmental Violations, 24 Env't. Rep. 1378 (Nov. 26, 1993).

provision in light of the "general limitations"; and, finally, determining the sentencing requirements and options relating to "probation".<sup>210</sup>

One aggravating factor applicable to the subject matter of this paper would result in a four level increase in the base offense level. Under Sec. 9C1.1(f), the absence of a compliance program or other organized effort to achieve and maintain compliance with environmental requirements would constitute an aggravating factor.<sup>211</sup>

As mitigating factors, the proposed guideline lists:

1. Commitment to Environmental Compliance - If the organization demonstrates that, prior to the offense, it had committed the resources and the management processes that were reasonably determined to be sufficient given the size and the nature of its business, to achieve and maintain compliance with environmental requirements, including detection and deterrence of criminal conduct by its employees or agents, it earns a three to eight level reduction. If an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense, there shall be a rebuttable presumption that the organization had not made the necessary commitment.
2. Cooperation and Self-Reporting - if, prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offense, the organization reported the offense to appropriate governmental authorities, fully cooperated in the investigation and clearly demonstrated recognition of its responsibility and took all reasonable steps to assess responsibility within the organization and prevent recurrence, it earns a three to six level reduction; provided, however, that *no credit shall be given for mere compliance with an applicable federal reporting requirement.* (emphasis mine).
3. Remedial Assistance - if the organization takes prompt action to provide assistance (in addition to any legally required restitution or remediation) to the victims of its crime to mitigate their losses, it earns a two level reduction.<sup>212</sup>

To determine whether the violator deserves mitigation for a commitment to environmental compliance, Part D of the guidelines requires the substantial satisfaction of

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<sup>210</sup> *Id.*, § 9A1.2.

<sup>211</sup> *Id.*, at 1381.

seven factors: (1) Line management attention to compliance; (2) Integration of environmental policies; (3) Auditing, monitoring, reporting, and tracking systems; (4) Regulatory expertise, training, and evaluation; (5) Incentives for compliance; (6) Disciplinary procedures; and (7) Continuing evaluation and improvement.<sup>213</sup> Under Part E, all fines determined under this system must include the economic gain plus costs directly attributable to the offense.<sup>214</sup> The guidelines exempt from this rule only those cases where recovery of the economic benefit would impair the ability of the defendant to make restitution to the victim or cause the defendant's financial liquidation, provided the defendant is not a "criminal purpose organization" and has not engaged in a sustained pattern of serious environmental violations.<sup>215</sup> Finally, the guidelines do authorize a court to impose as a condition of probation that the organization adopt an approved program to identify and correct any conditions that resulted in the conviction and to prevent and detect any future violations.<sup>216</sup>

#### *E. Federal Legislation.*

The subject of environmental auditing has attracted the attention of Congress in a number of ways. The focus ranges from the Statement of Managers discussed above to a Sense of the Senate resolution, to proposed federal audit legislation, and to a controversial appropriations rider.

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<sup>212</sup> *Id.*, at 1381-82.

<sup>213</sup> *Id.*, at 1382-83.

<sup>214</sup> *Id.*, at 1384.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*, at 1388.

When the Senate passed the FY1995 VA-HUD Appropriations Act, it adopted an amendment entitled Sense of the Senate Regarding the Environmental Self-Evaluation Privilege.<sup>217</sup> After finding that four states had enacted audit privilege laws and that EPA was considering modification of its policy, the Senate announced that:

1. The National Performance Review is correct in stating that EPA must recognize that increased regulatory flexibility offers tremendous opportunity for positive institutional change at federal, state and local levels.
2. EPA must take advantage of these opportunities by finding ways to allow flexibility without compromising fairness, accountability and, above all, performance.
3. The EPA should seriously consider the “environmental self-evaluation privilege,” as enacted into law by the States of Oregon, Indiana, Kentucky and Colorado, as a low-cost opportunity to increase performance toward the intended effect of environmental protection statutes to improve and protect the natural and human environment.<sup>218</sup>

### 1. Senate Bills.

Four days later on August 8, 1994, Senator Hatfield introduced Senate Bill 2371, the Environmental Audit Protection Act.<sup>219</sup> To encourage regulated entities to conduct voluntary environmental audits, the bill offered a very limited legal privilege for audit reports, provided the company took corrective action to avoid violation of environmental laws. Senator Hatfield modeled his bill on the Oregon law by limiting the protection to the audit report not the violation itself.<sup>220</sup> As long as the entity, acted promptly to achieve compliance, the report was not subject to discovery and could not be admitted into

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<sup>217</sup> 140 Cong. Rec. S10580.

<sup>218</sup> *Id.*

<sup>219</sup> 140 Cong. Rec. S10942.

<sup>220</sup> *Id.*

evidence in any civil or criminal action or administrative proceeding before a Federal court or agency.<sup>221</sup>

The bill excluded from the privilege information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency; information obtained by observation, sampling, or monitoring by any regulatory agency; or information obtained from a source independent of the environmental audit. It also made the privilege inapplicable to reports, if the company did not promptly initiate and pursue with reasonable diligence appropriate efforts to achieve compliance with the law.<sup>222</sup> To determine the applicability of the protection, the bill authorized in camera judicial proceedings.<sup>223</sup> The proposed legislation contained a special provision for the Attorney General to use the audit report as evidence in a criminal proceeding, if the prosecutor could establish its relevance, had a compelling need for the information, and was unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay, as long as the information was not otherwise available.<sup>224</sup> The bill was never enacted.

In the next Congress, Senator Hatfield reintroduced legislation to provide protection for environmental audits. This bill, which Senator Brown of Colorado co-sponsored, differed significantly from the previous proposal in that it added immunity for voluntary disclosure.<sup>225</sup> When introducing the Environmental Audit Privilege Act (hereinafter “S. 582”), Senator Hatfield stated he was making “the point that the Federal

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<sup>221</sup> 140 Cong. Rec. S10943.

<sup>222</sup> *Id.*

<sup>223</sup> 140 Cong. Rec. S10944.

<sup>224</sup> 140 Cong. Rec. S10943-44.

government should encourage responsible actions by businesses with incentives and flexibility, rather than through threats and penalties.”<sup>226</sup> He also commented, “Incentives for self-enforcement will help free up the very limited resources of Federal and State environmental and enforcement agencies, allowing them to pursue the most severe, egregious, and dangerous violations of our environmental laws.”<sup>227</sup> Another reason for passing federal legislation was to support states with audit laws because litigants could bypass the state privilege by suing in federal court which might not recognize the state privilege.<sup>228</sup>

The new bill retains the privilege provision of the previous bill with the exception of access by the Attorney General under specific circumstances.<sup>229</sup> The privilege does not apply if: (1) the entity expressly waives it; (2) a Federal court determines, after an in camera hearing, the report provides evidence of a violation and the entity did not promptly initiate and pursue with reasonable diligence appropriate efforts to achieve compliance; or (3) the entity asserts the privilege for a fraudulent purpose.<sup>230</sup>

Under this legislation, when a court determines the applicability of the privilege, the party invoking the protection carries the burden of proof, including establishing prompt initiation and reasonable diligence in correcting the violation. On the other hand, the party seeking the audit report bears the burden of proving an express waiver or the

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<sup>225</sup> S. 582, 104th Cong., 1st Sess. (1995) (Senators Inhofe of OK, Simpson of WY, Thomas of WY, Pressler of SD, Burns of MT, and Lott of MS were subsequently added as co-sponsors).

<sup>226</sup> 141 Cong. Rec. S4264.

<sup>227</sup> *Id.*, at S4265.

<sup>228</sup> *Id.*, at S4264.

<sup>229</sup> See *supra* note 225, at §3801.

<sup>230</sup> *Id.*, §3801(a)(3).

existence of a fraudulent purpose.<sup>231</sup> The bill does not effect the applicability of any common law or statutory rule covering discovery or evidentiary matters, including the attorney-client privilege and the work-product doctrine.<sup>232</sup>

In another provision that differs from the earlier bill, S. 582 prohibits requiring a person or government entity to testify about an environmental audit, including the report, which the person or government entity conducted, unless the person or government entity consents.<sup>233</sup> While the bill does not define “person”, it does define “government entity” as meaning a unit of a state or local government.<sup>234</sup> Therefore, federal agencies do not qualify for the privilege, nor do they receive protection under the voluntary disclosure provision.

In section 3803, the bill classifies the disclosure of information to regulatory agencies as voluntary if:

1. Derivative - the disclosure of information arises out of an environmental audit;
2. Prompt - the disclosure is made promptly after the person or government entity that initiates the audit receives knowledge of the information;
3. Satisfactory Corrective Action - the person or government entity that conducts the audit initiates an action to address the issues identified in the disclosure -
  - a. within a reasonable period of time after receiving knowledge of the information, and
  - b. within a period of time that is adequate to achieve compliance with the requirements of the applicable Federal law (including submitting an application for a permit); and
4. Cooperation - the person or government entity that makes the disclosure provides any further relevant information requested, as a result of the

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<sup>231</sup> *Id.*, §3801(c).

<sup>232</sup> *Id.*, §3801(d).

<sup>233</sup> *Id.*, §3802.

<sup>234</sup> *Id.*, §3804.

disclosure, by the appropriate official of the federal agency administering the law.<sup>235</sup>

In addition, the bill categorizes a disclosure as involuntary if a federal or state court has found the person or government entity guilty of repeated violations of environmental laws or consent orders due to separate and distinct events within three years prior to the disclosure.<sup>236</sup>

As long as the disclosure is not involuntary and the person or government entity provides information supporting its claim of voluntary disclosure, the bill creates a rebuttable presumption that the disclosure is voluntary. The person or government entity receives immunity from any administrative, civil, or criminal penalty for the violation, unless the presumption is rebutted.<sup>237</sup> The head of the federal agency bears the burden of rebutting this presumption. If it fails, the agency cannot assess an administrative penalty against the person or government entity, nor may it issue a cease and desist order for the violation. Furthermore, in that instance, a federal court may not impose a civil or criminal fine against the person or government entity.<sup>238</sup> Under S. 582, a decision made by the head of a federal agency constitutes final agency action.<sup>239</sup>

S. 582 currently rests in the Senate Judiciary Committee. On May 21, 1996, the Subcommittee on Administrative Oversight and the Courts held a hearing on the legislation.<sup>240</sup> At the hearing, Senator Hatfield noted that the bill needs improvement and suggested that Congress could glean the appropriate provisions for federal legislation

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<sup>235</sup> *Id.*, §3803.

<sup>236</sup> *Id.*, §3803(b).

<sup>237</sup> *Id.*, §3803(c).

<sup>238</sup> *Id.*, §3803(d).

<sup>239</sup> *Id.*, §3803(d)(2).

from the experience of the states with environmental audit privilege and immunity laws.<sup>241</sup> Another senator on the subcommittee added that states have only just begun to experiment with incentives for environmental auditing, consequently, which approach works best remains to be seen.<sup>242</sup> In opposition to the bill, the EPA Office of Enforcement and Compliance Assurance representative testified, "Under EPA's self-disclosure policy, responsible companies should have nothing to fear and nothing to hide from government. We believe that policy should be given a chance to work, and not be preempted by legislation that would increase litigation, burden the courts, frustrate law enforcement, and make the public even more cynical and distrustful of both government and industry."<sup>243</sup> This shared desire to examine the effectiveness of approaches to environmental audit incentives, although the methods themselves are perceived as conflicting, is critical to the point of this thesis and will be discussed more fully later. Incidentally, representatives from DOJ testified that their department opposed S. 582.<sup>244</sup>

## 2. House Legislation.

In the House of Representatives, Congressman Hefley introduced similar legislation on February 24, 1995.<sup>245</sup> The bill, titled Voluntary Environmental Self-Evaluation Act (hereinafter "H.R. 1047"), was sent to the Committee on the Judiciary

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<sup>240</sup> 142 Cong. Rec. D507.

<sup>241</sup> Cheryl Hogue, *Hatfield Tells Judiciary Panel His Audit Bill Needs Some Improvements*, Daily Env't Rep. (BNA), May 22, 1996, at AA-1.

<sup>242</sup> *Id.*

<sup>243</sup> *Environmental Audits: Hearings on S. 582 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1996) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA.).

<sup>244</sup> *Id.*, (joint statement of Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Div., DOJ; and Veronica Coleman, U.S. Attorney, West. Dist. of Tenn.).

<sup>245</sup> H.R. 1047, 104th Cong., 1st Sess. (1995). See 141 Cong. Rec. H2223.

and, additionally, to the Committees on Commerce, Transportation and Infrastructure, and Agriculture. The House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on this legislation on June 29, 1995.<sup>246</sup> Both EPA and DOJ representatives testified in opposition to the bill<sup>247</sup>

The privilege provision of H.R. 1047 states that, notwithstanding any other law, a report, finding, opinion, or other communication of a person or entity related to a voluntary environmental self-evaluation made in good faith may not be admitted as evidence in any federal legal action or administrative procedure, nor shall it be subject to discovery under federal law, except under the following circumstances:

1. The person or entity expressly waives the privilege;
2. A federal court determines, after conducting an in camera hearing, that -
  - a. The communication indicates noncompliance, and the person or entity failed to initiate efforts to achieve compliance within a period of time that is reasonable and adequate to achieve compliance (including submitting a permit application);
  - b. Compelling circumstances require admission or discovery of the communication;
  - c. The person or entity is asserting the privilege for a fraudulent purpose; or
  - d. The communication was prepared to avoid disclosure required for an investigative, administrative, or judicial proceeding that, at the time of preparation, was imminent or in progress.<sup>248</sup>

The House bill excludes from the privilege: (1) information required to be developed, maintained, or reported by federal law; (2) information required by federal law to be available to a regulatory agency; (3) information obtained by a regulatory

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<sup>246</sup> 141 Cong. Rec. D811.

<sup>247</sup> *Protection of Environmental Self-Evaluation Data: Hearings on H.R. 1047 Before the Subcomm. On Commercial and Administrative Law of the House Judiciary Committee*, 104th Cong., 1st Sess. (1995) (statements of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, and Randall Rathburn, U.S. Attorney, Dist. of Kan.).

agency through observation, sampling, or monitoring; or (4) information obtained by a regulatory agency from an independent source.<sup>249</sup> Section 5 of the bill protects the person or entity from having to testify about a voluntary self-evaluation in a Federal court or administrative proceeding without the consent of the person or entity.

The immunity provision of H.R. 1047 matches the Senate bill, except for a few instances. Where S. 582 classifies “repeated violations” as involuntary disclosure, the House bill specifies “a pattern of significant violations”.<sup>250</sup> In addition, H.R. 1047 provides that if the regulatory agency fails to rebut the presumption, a federal or state court may not assess a criminal negligence penalty against the person or entity; whereas, the Senate bill precludes all criminal fines under that circumstance.<sup>251</sup> Although S. 582 does not specify who determines whether a federal agency has satisfactorily rebutted the presumption of voluntary disclosure, the House bill identifies the head of the federal or state agency as the final decision maker.<sup>252</sup>

In May, 1996, seventeen Democrat Representatives sent a letter to Vice President Gore requesting his support for federal environmental audit legislation granting privilege and immunity.<sup>253</sup> The letter sought endorsement for legislation that excluded from protection companies that willfully or intentionally violate environmental law and entities that do not promptly correct violations. Representing mostly the states with audit laws, the House members stated, “We are convinced that this new, non-adversarial approach

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<sup>248</sup> *Supra* note 245, § 4(a).

<sup>249</sup> *Id.*, § 4(b).

<sup>250</sup> *Id.*, § 6(b).

<sup>251</sup> *Id.*, § 6(d)(1)(B).

<sup>252</sup> *Id.*, § 6(d)(2).

<sup>253</sup> *Audits: Letter From House Democrats Urges Gore To Support Privilege, Immunity*, Nat'l Env't. Daily, (BNA) May 24, 1996, at A-6.

towards enhancing compliance will increase environmental protection while helping to break down the barriers between government and business.”<sup>254</sup> This method, according to the letter, fits nicely with Gore’s philosophy of reinventing government for environmental protection.

In response to this effort, the National District Attorneys Association replied with a letter to the seventeen representatives asking them to reject protection for environmental audits from criminal action.<sup>255</sup> Fearing that creating a privilege for environmental audits might open the door, the prosecutors warned, “A privilege afforded this segment of corporate America can only trigger demands that (sic) comparable protection by other elements of the business world with self-evaluating procedures.”<sup>256</sup> As for granting immunity, the letter suggested straightforward decriminalization of some environmental violations, if that is what Congress desires, rather than unduly tying the hands of law enforcement officials. The prosecutors also encouraged the representatives to consider creating an affirmative defense or providing penalty mitigation, instead of granting privilege and immunity for noncompliance.

Vice President Gore received a copy of the District Attorneys’ letter, as well. On June 21, 1996 when addressing the California District Attorneys’ Association, he reaffirmed the administration’s opposition to the pending federal audit legislation. The Vice President stated that S. 582 and H.R. 1047 would hamstring federal prosecutors and provide a “blanket immunity for environmental violations, no matter how serious, as long

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<sup>254</sup> *Id.*

<sup>255</sup> *Environmental Audits: Prosecutors Ask Conservative Democrats In House To Reject Privilege, Immunity*, Daily Env’t Rep. (BNA) Jun. 17, 1996, at A-3.

<sup>256</sup> *Id.*

as they are disclosed and corrected.”<sup>257</sup> In addition, he said that the privilege provision enabled violators to hide evidence of misconduct. The administration, according to the Vice President, seeks to strengthen enforcement of environmental crimes by hiring more federal criminal investigators and providing more training to all levels of law enforcement.

While the politicking continues over the pending federal bills, another representative has drafted legislation that, in addition to amending the CAA, would prohibit the use of information generated by a voluntary self-audit as evidence in federal or state courts. Representative Stockman of Texas has circulated draft copies of the bill, titled Energy Relief and Job Preservation Act, and plans to introduce it soon.<sup>258</sup>

Before leaving the federal arena, one interesting event to note concerning the environmental audit debate occurred during the FY 1996 appropriations debacle. Initially, the appropriations bill for independent federal agencies contained a rider providing, “That none of the funds appropriated under this heading may be used to obtain a voluntary environmental audit report or to assess an administrative, civil or criminal negligence penalty, in any matter subject to a state law providing a privilege for voluntary environmental audit reports or protections or immunities for the voluntary disclosure of environmental concerns.”<sup>259</sup> This straight jacket never became law, but the Conference Committee did state that EPA Regions and headquarters must discard the old “command

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<sup>257</sup> *Environmental Audits: Administration Elevates Level Of Opposition To Immunity In Audit Bills*, Nat'l. Env't. Daily (BNA) Jun. 25, 1996, at A-2.

<sup>258</sup> *Clean Air Act: Draft Bill Would Repeal Parts of Air Act In Attempt To Help Petrochemical Industry*, Nat'l. Env't. Daily (BNA) May 1, 1996 (5/1/96 NED d9).

<sup>259</sup> H.R. 2099, 104th Cong., 1st Sess., (1995); see 141 Cong. Rec. S14171.

and control" approach in favor of federal-state-business partnering and incentives.<sup>260</sup> Expressing concern about the approach to state initiatives contained in the Interim Policy, the report urged EPA to work with Congress to develop the appropriate policy. While the FY 1997 appropriations bill for EPA omits any restrictive riders, the report language should include a comment encouraging business to continue using self-inspections and EPA to move toward effective self-audit agreements with the states.<sup>261</sup>

## IV. State Audit Statutes.

### A. Overview.

Beginning with Oregon in 1993, eighteen states have enacted environmental audit legislation over the past few years.<sup>262</sup> Nine statutes were adopted in 1995, a year that saw

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<sup>260</sup> CONFERENCE REPORT ON H.R. 2099, DEPARTMENTS OF VETERANS AFFAIRS AND HOUSING AND URBAN DEVELOPMENT, AND INDEPENDENT AGENCIES APPROPRIATIONS ACT, 1996.H.R. CONF. REP NO. 384, 104th Cong., 1st Sess., (1995)

<sup>261</sup> *Appropriations: House Subcommittee Reports FY 1997 EPA Funding of \$6.55 Billion, With No Riders*, Nat'l. Env't Daily (BNA) May 31, 1996 (5/31/96 NED d3).

<sup>262</sup> Arkansas, 1995 Ark. Acts 350 (codified at ARK. CODE ANN. § 8-1-303); Colorado, COLO. REV. STAT. ANN. § 13-25-126.5 (West 1994); Idaho, S.B. 1142, 53rd Leg., 1st Sess. (1995)(to be codified at IDAHO CODE §§ 9-801 to -811, § 9-340)(enacted Mar. 22, 1995); Illinois, ILL. REV. STAT. ch. 415, para. 5/52.2 (1994)(formerly known as Ill. Public Act 88-0690); Indiana, IND. CODE ANN. §§ 13-28-4-1 to 4-10 (Burns Supp. 1996)(original version codified at IND. CODE ANN. §§ 13-10-3-1 to 3-12 (Burns Supp. 1994)); Kansas, KAN. STAT. ANN. § 60-3332 (1995), S.B. 76, 76th Leg. (1995)(enacted Apr. 22, 1995); Kentucky, KY. REV. STAT. ANN. § 224.01-040 (Michie Supp. 1994) (as amended 1996 Ky. S.B. 281, enacted Apr. 4, 1996); Michigan, 1996 Mich. Leg. Serv. P.A. 132 (S.B. 728)(West)(enacted Mar. 15, 1996); Minnesota, H.B. 1479, 79th Leg., 1995 Reg. Sess. (enacted May 17, 1995); Mississippi, S.B. 3079, 1995 Reg. Sess. (to be codified at MISS. CODE ANN. §§ 49-2-51, 49-17-42)(enacted Apr. 7, 1995, effective July 1, 1995); New Hampshire, 1996 N.H. LAWS Ch. 4 (H.B. 275)(to be codified at N.H. Rev. Stat. Ann. §147-E:1 to -E:9)(enacted Mar. 18, 1996); Oregon, OR. REV. STAT. § 468.963 (1993); South Carolina, 1996 S.C. Acts H.B. 3624, 1995-96 Statewide Sess.,(to be codified at S.C. CODE ANN. §48-57-10 to -110)(enacted Jun. 4, 1996); South Dakota, S.D. CODIFIED LAWS ANN. §§ 1-40-33 to -37 (1996)(1996 S.D. Laws S.B. 24)(enacted Mar. 8, 1996); Texas, TEX. REV. CIV. STAT. ANN. art. 4447cc (West 1996) (H.B. 2473, 74th Leg. 1995 Reg. Sess. (enacted May 23, 1995); Utah, S.B. 8, 51st Leg., 1st Sess. (to be codified at UTAH CODE ANN. §§ 19-7-101 to -108)(enacted Mar. 20, 1995); Virginia, VA. CODE ANN. §§ 10.1-1198, -1199 (Michie 1995) (enacted by H.B. 1845, 1994-95 Reg. Sess., on Mar. 24, 1995); and Wyoming, WYO. STAT. §§ 35-11-1105, -1106 (1977)(enacted by S.B. 96, 53rd Leg. 1st Sess. (1995) on Mar. 24, 1995)

thirty-four audit privilege bills introduced in state legislatures.<sup>263</sup> As of August, four states have added new audit laws in 1996.<sup>264</sup> While specific provisions vary, these statutes generally offer privileged treatment to environmental audits or, go one step further, to provide immunity for entities that discover, disclose, and correct violations during self-audits. Such laws universally require swift action to correct deficiencies.

In states with privilege laws, officials generally may not use audit information to take enforcement actions against companies which discover environmental violations.<sup>265</sup> Indeed, in these states enforcement agencies may not initiate efforts seeking protected environmental audit data from regulated entities, except under specific conditions.<sup>266</sup> These states include Arkansas, Illinois, Indiana, Mississippi, and Oregon. Under their laws, information obtained through audits may be treated as privileged evidence in administrative proceedings and civil actions, as well as in criminal actions in some states.<sup>267</sup>

To qualify for the privilege, companies must satisfy several conditions, including voluntary discovery prior to any government inspection or investigation.<sup>268</sup> In addition, entities must initiate steps to correct the violation within certain time frames.<sup>269</sup>

State laws also provide exceptions when the privilege will not protect companies. Knowing or willful violations may not be privileged<sup>270</sup>, nor will the privilege apply to

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<sup>263</sup> Cheryl Hogue, *Environmental Audits: State Privilege Legislation Multiplies in 1995; Predictions Differ About 1996*, Daily Env't Rep. (BNA), Aug. 30, 1995.

<sup>264</sup> See *supra* note 262.

<sup>265</sup> See OR. REV STAT. §§ 468.963(3)(b)(C), (c)(C).

<sup>266</sup> See ILL. REV. STAT. ch. 415, PARA. 5/52.2(d).

<sup>267</sup> See OR. REV STAT. § 468.963(3)(d).

<sup>268</sup> See Utah Code Ann. § 19-7-105 (referring to UTAH R. of EVID. 508).

<sup>269</sup> See OR. REV STAT. § 468.963(3)(b)(C).

fraudulent audits or to companies failing to make timely or proper corrections.<sup>271</sup> Similarly, the privilege may not cover violations presenting an imminent and substantial danger to human health or the environment.<sup>272</sup> Moreover, information that must be reported under release or permit requirements may not be subject to privilege.<sup>273</sup> This proviso also includes information that may be legally obtained from other sources, such as monitoring, observation, or sampling by a regulatory agency.<sup>274</sup> Under certain circumstances, the public interest in audit data may outweigh the expectation of confidentiality and may not be privileged if it cannot be obtained otherwise.<sup>275</sup>

In Colorado, Idaho, Kansas, Kentucky, Michigan, Minnesota, New Hampshire, South Dakota, New Jersey, South Dakota, Texas, Utah, Virginia, and Wyoming, statutes grant immunity to entities that voluntarily discover violations and promptly correct the problems. These laws specify similar conditions and exceptions as outlined above and all, but South Dakota and New Jersey, provide the privilege protection.<sup>276</sup> Many of the statutes provide only limited immunity in terms of establishing a presumption against imposing administrative, civil or criminal penalties for violations.<sup>277</sup> These statutes generally require voluntary disclosure before the entity receives immunity protection.<sup>278</sup> Because the immunity laws vary broadly in the breadth and depth of their coverage, prudence dictates careful attention to the specific provisions of the various statutes. For

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<sup>270</sup> *State Roundup, South Dakota, Governor Signs Audit Legislation*, Daily Env't Rep. (BNA), Mar. 19, 1996, at B-4.

<sup>271</sup> See OR. REV STAT. § 468.963(3)(c).

<sup>272</sup> See MISS. CODE ANN. § 49-2-51(1)(d).

<sup>273</sup> See OR. REV STAT. § 468.963(5)(a).

<sup>274</sup> See OR. REV STAT. § 468.963(5)(a).

<sup>275</sup> See OR. REV STAT. § 468.963(3)(c)(D).

<sup>276</sup> See COLO. REV. STAT. ANN. § 13-25-126.5(3).

<sup>277</sup> See COLO. REV. STAT. § 25-1-114.5 (1995)

example, New Jersey law establishes a "grace period" form of immunity for "minor violations", but not privileged treatment for audit reports.<sup>279</sup> Incidentally, Washington state grants immunity as an administrative policy rather than through legislation.<sup>280</sup>

The review of state audit laws begins with those statutes that offer only privileged protection for environmental audit reports. Next, this thesis examines the laws of the states that provide immunity protection.

### ***B. State Privilege Statutes.***

#### **1. Oregon.**

The first audit law in the nation provided privileged protection to an environmental audit report, thus making it inadmissible as evidence in any civil, criminal or administrative legal action.<sup>281</sup> Subsection (6)(a) defined an "environmental audit" as:

a voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under [applicable Oregon statutes] or the federal, regional or local counterpart or extension of such statutes, or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees or by independent contractors.

The environmental audit report<sup>282</sup> privilege does not apply if it is waived expressly or by implication under subsection (3)(a) by the facility owner or operator or the person conducting the activity that prepared or caused the report to be prepared.

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<sup>278</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 10 (West 1996)

<sup>279</sup> 1995 NJ Sess. Law Serv. ch. 296 (Assembly 1521)(West)(enacted Dec. 22, 1995).

<sup>280</sup> See *supra* note 11.

<sup>281</sup> See OR. REV. STAT. § 468.963(2).

Pursuant to subsection (3)(b), in a civil or administrative proceeding, after in camera review, a court must order disclosure of an audit report, if it determines:

1. Fraud - that the privilege is asserted for a fraudulent purpose;
2. Unqualified - that the material is not subject to the privilege; or
3. Unsatisfactory Corrective Action - that the report shows evidence of noncompliance and the entity failed to promptly initiate and pursue with reasonable diligence appropriate efforts to achieve compliance.

After an in camera review, in a criminal proceeding, according to subsection (3)(c), a court shall require disclosure of a report upon determining that either of the three conditions above apply or that:

1. The report contains evidence relevant to the commission of specified offenses;
2. The district attorney or Attorney General has a compelling need for this evidence;
3. The evidence is not otherwise available; and
4. The prosecutor cannot obtain the substantial equivalent of the evidence by any means without incurring unreasonable cost and delay.

For reference this paper identifies this fourth potential determination as the Necessary Circumstances condition.

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<sup>222</sup> Defined in subsection (6)(b) as "a set of documents, each labeled 'Environmental Audit Report: Privileged Document' and prepared as a result of an environmental audit. An Environmental Audit Report may include field notes and records of observations, findings, opinions, suggestions, conclusions, recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An Environmental Audit Report, when completed, may have three components: (A) An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices; (B) Memoranda and documents analyzing portions or all of the audit report and potentially discussing implementation issues; and (C) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance."

Subsection (3)(d) allocates the burden of proof for the respective parties. The party asserting the privilege must establish the report qualifies for protection under the law and satisfactory corrective action was taken. A party seeking disclosure bears the burden of proving Fraud. To establish Necessary Circumstances, the district attorney or Attorney General has the burden of proof.

If an independent source provides sufficient information to establish probable cause that a specified offense has been committed, the prosecutor may obtain an audit report, under subsection (4)(a), by search warrant, criminal subpoena or discovery. The prosecutor must immediately place the report under seal and may not review or disclose its contents. Subsection (4)(b) provides thirty days for the owner or operator who prepared or caused the preparation of the report to file a petition requesting in camera review, or the privilege is waived. Once a petition is filed, the court shall order an in camera hearing within forty-five days to determine whether the report qualifies for the privilege. This order must allow the prosecutor to review the report, subject to limitations protecting against unnecessary disclosure. Although the prosecutor may discuss the report with enforcement agencies to prepare for the hearing, subsection (4)(c) specifies that any information shall not be used against the defendant in any investigation or proceeding, unless the court subsequently orders disclosure. For reference, these provisions will be referred to as the Limited Access and Restricted Use provisions.

Along with the Probable Cause provision, subsection (4) authorizes the parties to stipulate to an order determining that specific information in the report is or is not privileged. Subsection (4)(e) directs a court to order the disclosure of only the relevant

portions of the report, if it determines that information in the report is subject to disclosure.

Under subsection (5), the audit privilege does not extend to:

1. Required Information - documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to specific Oregon statutes, or other federal, state or local law, ordinance, regulation, permit or order;
2. Agency Obtained Information - information obtained by observation, sampling or monitoring by any regulatory agency; or
3. Independent Information - information obtained from a source independent of the environmental audit.

Subsection (7) provides that the audit law does not limit, waive or abrogate the nature or scope of any common law or statutory privilege, including the attorney-client privilege or work-product doctrine. This paper will refer to this as the No Interference provision.

## 2. Indiana.

Indiana initially enacted an environmental audit law in 1994.<sup>283</sup> By amendment, effective July 1, 1996, the new audit act provides an updated version of the same privilege protection.<sup>284</sup> Chapter 4, Voluntary Environmental Audits, subsection 1, specifies that a report - defined the same as an Oregon report - is privileged and not admissible as evidence in a civil, criminal, or an administrative action, including certain enforcement actions.

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<sup>283</sup> See IND. CODE ANN. §§ 13-10-3-1 to 3-12 (Burns Supp. 1994).

<sup>284</sup> See 1996 Ind. Legis. Serv. P.L. 1-1996, §§ 1 & 18 (West)(to be codified at IND. CODE ANN. §§ 13-11-2-69 and 13-28-4-1 to -4-10).

Subsection 2 details the exceptions to the privilege that apply in civil or administrative proceedings.<sup>285</sup> Adding the requirement for the court to determine that the report was first issued after July 1, 1994, this subsection contains the same provisions as the Oregon law for the In Camera Review process, Fraud exception, Unqualified exception, and Unsatisfactory Corrective Action exception. It differs from the Oregon act by specifying that noncompliance by failing to obtain a permit can be satisfactorily corrected by filing a permit application within 90 days of finding the error.

For criminal proceedings, subsection 3 includes the Oregon provisions for the In Camera Review process, as well as the exceptions for Fraud, Unqualified report, Unsatisfactory Corrective Action, and Necessary Circumstances.<sup>286</sup> This subsection also adds the July 1, 1994 requirement and the 90 day Permit Application clause.

Identical to the Oregon law, subsection 4 allocates the respective burdens of proof and subsection 5 provides the Probable Cause authority for prosecutors. This latter provision contains the same 30 Day Petition right for owners and operators, as well as the directive for Scheduling and Protective court orders. In consonance with the Oregon law, subsection 6 authorizes the court to order disclosure of only the relevant portions of an audit report.

Subsection 7, which contains similar exclusions from privilege for an Express or Implicit Waiver, varies from the Oregon law by providing that a party does not waive the privilege by submitting an audit report to the regulatory agency as a confidential document under Indiana law. As allowed in the Oregon act, the parties can stipulate to an

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<sup>285</sup> See IND. CODE ANN. § 13-28-4-2.

<sup>286</sup> See IND. CODE ANN. § 13-28-4-3.

order, under subsection 8, identifying what information is or is not privileged. This paper will refer to the latter provision as the Stipulation provision.

Indiana followed Oregon again in subsection 9 by excluding from the audit privilege Required Information, Agency Obtained Information, and Independent Information. In a variation from the Oregon law, this subsection prohibits the regulatory agency from circumventing the privilege by adopting a rule or permit condition requiring disclosure of a voluntary audit report. Subsection 10 contains the same No Interference provision as the Oregon act.

### 3. Illinois.

In 1994, Illinois joined Oregon and Indiana by providing privileged protection for environmental audits and making them inadmissible in civil, criminal, or administrative proceedings.<sup>287</sup> In contrast with the other two statutes, Sec. 5/52.2(c) specified a Testimonial protection similar to that offered in the pending federal legislation.<sup>288</sup> Subsection (d)(1) also differs in that it makes the privilege not applicable if the owner or operator expressly waives it, omitting any reference to implicit waivers.

Deviating from the Oregon law which distinguishes between the requirements for reviewing information asserted to be privileged applicable to civil, criminal, or administrative proceedings, subsection (d)(2) combines the directives into one section. Perhaps, the reason for such drafting lies in the fact that Illinois does not provide for the Necessary Circumstances exception to the privilege. This subsection includes the In

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<sup>287</sup> See ILL. REV. STAT. ch. 415, para. 5/52.2 (1994)(formerly known as Ill. Public Act 88-0690).

<sup>288</sup> See *supra* note 245.

Camera process, Fraud exception, and Unqualified exception, but modifies the Unsatisfactory Corrective Action exception by specifying, "... the owner or operator failed to undertake appropriate corrective action or eliminate any reported violation within a reasonable time."<sup>289</sup> As another difference, subsection (d)(2) allows a regulatory "Board", as well as a court, to conduct the review.

As with the Oregon law, subsection (d)(3) divides the burden of proof; however, it differs by requiring the State's Attorney or Attorney General to prove the Unsatisfactory Corrective Actions exception. In Illinois, the owner or operator does not have to prove satisfactory corrective action. Subsection (d)(4) also varies by specifying that the owner or operator, when asserting the privilege, must provide the date of the report, the identity of the entity conducting the audit, the name and location of the audited facility, and an identification of which portions of the report are asserted to be privileged. In another addition, subsection (d)(5) precludes a State's Attorney or Attorney General from subsequently initiating a written request for information a court or the Board has ruled privileged.

Rather than provide the Probable Cause authority to prosecutors as does the Oregon law, subsection (e)(1) provides that the owner or operator has thirty days from when the prosecutor makes a written request for the report to file a petition with a court or the Board requesting an in camera hearing. Failure to file the petition waives the privilege. In the petition, the owner or operator must provide the same information identifying the report as it did for the prosecutor. This subsection differs from the Oregon

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<sup>289</sup> See ILL. REV. STAT. ch. 415, para. 5/52.2(d)(2)(C).

law by not expressly granting the prosecutor access to the report under a protective order, although subsection (e)(3) does contain the Scheduling order provision.

Subsection (e)(4) includes a similar directive for the court or the Board to order disclosure upon determining the Fraud exception, Unqualified exception, or the Illinois version of the Unsatisfactory Corrective Action exception applies. The Illinois law repeats its variation of the burden of proof allocation in subsection (e)(5). Presumably, the audit identification data required of the owner or operator compensates for omitting the Limited Access provision and allows the prosecutor an opportunity to carry its burden.

As with the Oregon law, subsection (f) includes the Stipulation clause. Subsection (g) also mirrors the Oregon act by directing the court or the Board to order disclosure of only the relevant portions of the report, which this paper will refer to as the Relevant Disclosure order. In consonance with the Oregon law, subsection (h) excludes from the privilege Required Information, Agency Obtained Information, and Independent Information. However, this subsection specifies that nothing in the act “limits, waives, or abrogates existing or future obligations of regulated entities to monitor, record, or report information required under State, federal, regional, or local laws, ordinances, regulations, permits, or orders.”<sup>290</sup>

In subsection (i), the Illinois law defines “environmental audit” and “environmental audit report” identical to the Oregon statute. Subsection (j) contains the No Interference provision.

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<sup>290</sup> See ILL. REV. STAT. ch. 415, para. 5/52.2(h).

#### 4. Arkansas.

Arkansas adopted its audit law in 1995 to enhance the protection of the environment by encouraging voluntary identification and remedying of environmental compliance issues.<sup>291</sup> Subsection 302 provides the same definitions as does the Oregon law for “environmental audit” and “environmental audit report”. Protecting the report as privileged, subsection 303 specifies that it shall not be admissible as evidence in any civil, criminal, or administrative legal action, including any enforcement actions. This will be referred to as the Privilege/Inadmissibility provision.

Subsection 304 outlines when the privilege does not apply and contains the Express Waiver exception. However, it differs from the Oregon act in several respects. First, subsection 304(a)(2) also excludes from the privilege instances where the owner or operator seeks to introduce the report as evidence. Second, subsection 304(a)(3) provides that the privilege is waived if the owner or operator discloses the report to anyone but specific parties. Provided a confidentiality agreement exists, the owner or operator can safely disclose the report to a potential purchaser of the facility; a customer, lending institution, or insurance company with an existing or proposed relationship with the facility; or a government official. Under this subsection, the owner or operator can also retain the privilege when disclosing the report to an independent contractor who is engaged in identifying noncompliance and assisting in achieving compliance with reasonable diligence. Finally, subsection 304(b) allows for waiver of all or any portion of the report. This subsection does not address any other implicit waiver of the privilege.

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<sup>291</sup> 1995 Ark. Acts 350, §1 (codified at ARK. CODE ANN. § 8-1-301 to -312).

Similar to the Oregon statute, under subsection 305, the privilege does not apply to Required Information, Agency Obtained Information, or Independent Information.

Subsection 306 contains the same Stipulation provision found in the Oregon act. Very similar to the Oregon law regarding civil or administrative proceedings, subsection 307 lists the Fraud, Unqualified material, and Unsatisfactory Corrective Action provisions, as grounds for disclosure of the report. The Arkansas law does, however, allow an administrative tribunal, as well as a court, to make the determination. This subsection also differs by including the ninety day Permit Application clause found in the Indiana statute. Subsection 307(b)(2) goes a little further by authorizing the regulatory agency to agree on a schedule that extends the time period for preparing a permit application, when necessary.

Governing disclosure in a criminal proceeding, subsection 308 employs the identical provisions outlined above for civil and administrative proceedings. Of course, only a court can make the necessary determinations under this subsection. It does not contain the Necessary Circumstances exclusion.

Arkansas granted Probable Cause authority in subsection 309 as described for the Oregon audit law. This subsection contains the Thirty Day Petition right to the owner or operator, who waives the privilege if the petition is not filed timely. Under 309(c)(1), the court or administrative tribunal must issue the same Scheduling and Protective orders as in the Oregon act. The Protective order covers the same matters as the Limited Access and Restricted Use provisions of the Oregon statute.

Subsection 310 allocates the burden of proof in the same manner as the Oregon law. The Relevant Disclosure limitation of the Oregon act is found in subsection 311.

While subsection 312 contains the same No Interference clause as does the Oregon law, it adds that nothing in its provisions limits, waives, or abrogates the rights of the public under the Arkansas Freedom of Information Act.

## 5. Mississippi.

Although EPA attempted to discourage Mississippi, that state adopted a limited privilege for environmental self-evaluations.<sup>292</sup> The definitions for the key terms “environmental self-evaluation”<sup>293</sup> and “environmental self-evaluation report”<sup>294</sup> vary slightly from the Oregon act. Also peculiar to the Mississippi law, section 1 of the enacting legislation expresses the intent that the state regulatory agency implement the law, “so as not to result in a loss of state delegation of federal environmental programs.”<sup>295</sup>

While section 49-2-51(1) makes the self-evaluation report privileged, similar to the Oregon law, it goes further to exempt the report from discovery under civil, criminal, and administrative procedures. Subsection (1)(a) excludes such reports from the privilege, when the person for whom it was prepared expressly waives the protection. Differing from the Oregon act, this provision does not include address implicit waivers.

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<sup>292</sup> See S.B. 3079, 1995 Reg. Sess. (to be codified at MISS. CODE ANN. §§ 49-2-51, 49-17-427)(enacted Apr. 7, 1995, effective July 1, 1995)

<sup>293</sup> See MISS. CODE ANN. § 49-2-2 9 (defined to mean “a self-initiated internal assessment, audit, or review, not otherwise expressly required by environmental law, of a facility or an activity at a facility, or management systems related to a facility or an activity. A voluntary self-evaluation shall be designed to identify and prevent noncompliance with environmental laws, and improve compliance with environmental laws. In addition, a voluntary self-evaluation must be conducted by an owner or operator of a facility or an employee of the owner or operator or by a private contractor engaged by the owner or operator.”).

<sup>294</sup> See MISS. CODE ANN. § 49-2-2 (defined to mean “any document, including any audit, report, finding, communication, or opinion or any draft of an audit, report, finding, communication or opinion, prepared solely as a part of or in connection with a voluntary self-assessment that is done in good faith, which report is kept and maintained solely within the confines of the evaluated party.”).

The Mississippi audit law also denies the privilege when a court or a neutral and independent hearing officer, after in camera review, determines that:

1. Unsatisfactory Corrective Action - the report manifests noncompliance and the person did not initiate efforts to achieve compliance with the environmental law or complete any necessary permit application promptly after discovering the noncompliance and, as a result, did not or will not achieve compliance or complete the necessary permit application within a reasonable amount of time;<sup>295</sup>
2. Fraud or Avoidance - the privilege is being asserted for a fraudulent purpose or that the report was prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, or for which the person had been provided written notification that an investigation into a specific violation had been initiated,<sup>297</sup> or
3. Endangerment - a condition exists that demonstrates an imminent and substantial hazard or endangerment to the public health and safety or the environment.<sup>298</sup>

The automatic exclusions specified in subsection (2) also vary from those in the Oregon law. Under this subsection, the privilege does not apply to:

1. Required Information - documents or information required to be developed, maintained or reported pursuant any environmental law or any other law or regulation;
2. Available Information - documents or other information required to be made available or furnished to a regulatory agency pursuant to any environmental law or any other law or regulation;
3. Agency Obtained Public Information - information in the possession of a regulatory agency obtained through observation, sampling, monitoring or otherwise and which is subject to public disclosure pursuant to the Mississippi Public Records Act;

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<sup>295</sup> See S.B. 3079, 1995 Reg. Sess., at § 1.

<sup>296</sup> See MISS. CODE ANN. § 49-2-51(1)(b), (for the purposes of this subsection only, if the evidence shows noncompliance by a person with more than one environmental law, the person may demonstrate that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person into compliance with all of such environmental laws.).

<sup>297</sup> See MISS. CODE ANN. § 49-2-51(1)(c).

<sup>298</sup> See MISS. CODE ANN. § 49-2-51(1)(d).

4. Independent Information - information obtained through any source independent of the environmental self-evaluation report; or
5. Prior Information - documents existing prior to the commencement of and independent of the voluntary self-evaluation with the exception of evidence establishing a request for compliance assistance to the appropriate government agency or authority.<sup>299</sup>

Under subsection (3), a court or neutral and independent hearing office may grant limited access to the self-evaluation report, for the purposes if the in camera review only, to any party demonstrating probable cause exists, based on independent knowledge, that an exception under subsection (1) or an exclusion under subsection (2) applies.<sup>300</sup> The court or hearing officer can limit the access to all or part of the report and impose conditions necessary to protect confidentiality. Furthermore, this subsection prohibits a party gaining access to the report from divulging any information except as specifically allowed by the court or hearing officer. This subsection differs from the Oregon law by allowing any party, not just a prosecutor, to demonstrate probable cause and provides for discretionary not mandatory limited access.

Subsection (3)(b) imposes liability on a party or any other person who divulges or disseminates any information in a self-evaluation report in violation of this subsection. It also authorizes the court or hearing officer to issue necessary contempt orders and sanctions against the offending party or such party's legal counsel.

Mississippi included the No Interference provision of the Oregon statute in subsection (4). Under subsection (5), the burden of proof allocation differs from the Oregon law, in that the party asserting the privilege must establish a "prima facie case as

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<sup>299</sup> See MISS. CODE ANN. § 49-2-51(2)(a) to (e).

to the privilege.”<sup>301</sup> On the other hand, the party seeking the report bears the burden of proving that the privilege does not exist. Arguably, this may be interpreted to mean the owner or operator does not have to prove satisfactory corrective action. In another interesting twist, subsection (6) exempts qualifying self-evaluation reports from the provisions of the Mississippi Public Records Act.<sup>302</sup>

When Mississippi enacted the self-evaluation privilege, it also amended the civil penalty provisions of its various environmental laws.<sup>303</sup> These acts now require the regulatory commission, when determining the amount of penalty, to consider whether the noncompliance was discovered and reported as the result of a voluntary self-evaluation. If a person detects noncompliance through a voluntary self-evaluation and voluntarily discloses it, the commission must, to the greatest extent possible, reduce a penalty, except for the economic benefit, to a de minimis amount, as long as all of the following conditions are met:

1. Prompt - the person discloses the information promptly after discovering the noncompliance;
2. Satisfactory Corrective Action - the person initiates the appropriate corrective actions and pursues them with due diligence;
3. Cooperation - the person cooperates with the commission and the agency regarding investigation of the issues identified in the disclosure;
4. Voluntary - environmental law does not otherwise require the person to make the disclosure;

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<sup>300</sup> See MISS. CODE ANN. § 49-2-51(3).

<sup>301</sup> See MISS. CODE ANN. § 49-2-51(5).

<sup>302</sup> See MISS. CODE ANN. § 49-2-51(6).

<sup>303</sup> See MISS. CODE ANN. §§ 17-17-29, 49-17-43, & 49-17-427.

5. Not Independent or Agency Obtained Information - the information was not obtained through any source independent of the voluntary self-evaluation or by the agency through observation, sampling, or monitoring; and
6. No Endangerment - the noncompliance did not substantially endanger the public health, safety or welfare or the environment.

***C. State Privilege and/or Immunity Statutes.***

**1. Colorado.**

It seems impossible to discuss the audit law in Colorado without mentioning the infamous case involving Coors Brewing Company. Whether you subscribe to the belief that the audit privilege would or would not have applied in that case, the fact remains that the Colorado Legislature responded to it with the Environmental Self-Evaluation Act<sup>304</sup>

In the Coors case, the company spent \$1 million auditing its brewing process, which detected previously unknown information about VOC emissions. When Coors disclosed this to state regulators, it received a proposed fine of over \$1 million. Ultimately, the company settled with the state by agreeing to reduce its emissions and pay a \$237,000 penalty.<sup>305</sup> This case - along with a survey conducted by the Colorado Pollution Prevention Partnership, which disclosed that fear of enforcement inhibited companies from coordinating with state regulators on programs to improve environmental performance - led to Colorado adopting a privilege for and granting limited immunity to companies conducting audits.<sup>306</sup>

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<sup>304</sup> See COLO. REV. STAT. § 13-25-126.5; see also *Colorado: Bill Provides Protections To Companies That Report Violations After Self-Audits*, Daily Env't Rep. (BNA) May 17, 1994, at B-1.

<sup>305</sup> *Id.*

<sup>306</sup> Cynthia L. Goldman, *Colorado Seeks To Promote Environmental Compliance Audits*, Daily Env't Rep. (BNA) Jul. 27, 1994 (1994 DEN 142 d17).

In 1994, Colorado enacted its audit law by amending its evidentiary code<sup>307</sup> and its environmental law.<sup>308</sup> Subsection (3) of the evidence code makes an environmental audit report<sup>309</sup> privileged and not admissible in any legal action or administrative proceeding. This subsection varies from the Oregon act by not requiring the report to be labeled in any specific way and by prohibiting the discovery of the report under civil, criminal, or administrative procedural rules.

Subsection (3)(a) excepts from the privilege protection reports for which the entity or person for whom it was prepared waives the privilege. The provision does not specify that the waiver be express or implicit.

Also under subsection (3), which appears to be the model for the Mississippi act, a court or administrative law judge, after an in camera review, can find an exception to the privilege by determining that:

1. Unsatisfactory Corrective Action - the report manifests noncompliance and the person did not initiate efforts to achieve compliance with the environmental law or complete any necessary permit application promptly after discovering the noncompliance and, as a result, did not or will not achieve compliance or complete the necessary permit application within a reasonable amount of time;<sup>310</sup>
2. Compelling Circumstances - compelling circumstances exist that make it necessary to admit the report into evidence or to subject it to discovery procedures;<sup>311</sup>

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<sup>307</sup> See COLO. REV. STAT. § 13-25-126.5.

<sup>308</sup> See COLO. REV. STAT. § 25-1-114.5.

<sup>309</sup> See COLO. REV. STAT. § 13-25-126.5(2)(b) (defined to mean "any document, including any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion, related to and prepared as a result of a voluntary self-evaluation that is done in good faith.").

<sup>310</sup> See COLO. REV. STAT. § 13-25-126.5(3)(b), ("...for the purposes of this subsection only, if the evidence shows noncompliance by a person with more than one environmental law, the person may demonstrate that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person into compliance with all of such environmental laws.").

<sup>311</sup> See COLO. REV. STAT. § 13-25-126.5(3)(c).

3. Fraud or Avoidance - the privilege is being asserted for a fraudulent purpose or that the report was prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, or for which the person had been provided written notification that an investigation into a specific violation had been initiated;<sup>312</sup> or
4. Endangerment - information in the report demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property.<sup>313</sup>

The automatic exclusions specified in subsection (4) contain those found in the Oregon law with a few additions. They also appear to have been followed, in part, by Mississippi. Under this subsection, the privilege does not apply to:

1. Required Information - documents or information required to be developed, maintained or reported pursuant any environmental law or any other law or regulation;
2. Available Information - documents or other information required to be made available or furnished to a regulatory agency pursuant to any environmental law or any other law or regulation;
3. Agency Obtained Information - information obtained by a regulatory agency through observation, sampling, monitoring;
4. Independent Information - information obtained through any source independent of the environmental audit report or any person covered by section 13-90-107(1)(j)(I)(A);<sup>314</sup>
5. Prior Information - documents existing prior to the commencement of and independent of the voluntary self-evaluation;<sup>315</sup>

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<sup>312</sup> See COLO. REV. STAT. § 13-25-126.5(3)(d).

<sup>313</sup> See COLO. REV. STAT. § 13-25-126.5(3)(e).

<sup>314</sup> See COLO. REV. STAT. § 13-90-107(1)(j)(I)(A).

<sup>315</sup> See COLO. REV. STAT. § 13-25-126.5(2)(e) (" 'Voluntary self-evaluation' means a self-initiated assessment, audit, or review, not otherwise expressly required by environmental law, that is performed by any person or entity, for itself, either by an employee or employees employed by such person or entity who are assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person or entity expressly and specifically for the purpose of performing such assessment, audit, or review to determine whether such person or entity is in compliance with environmental laws. Once initiated, such voluntary self-evaluation shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted voluntary self-evaluations." )

6. Subsequent Information - documents prepared subsequent to the completion of and independent of the voluntary self-evaluation; or
7. Course of Business Information - any information, not otherwise privileged, developed or maintained in course of regularly conducted activity or regular practice.

Sec. 13-90-107(1)j)(T)(A) precludes examining as a witness a consultant or an officer or employee of a regulated entity that performed a qualifying voluntary self-evaluation without the consent of the regulated entity. The consultant, officer, or employee must have performed or participated in the audit, and the testimony prohibited relates only to the report or the audit itself.

Under subsection (5), a court or administrative law judge may grant limited access to the self-evaluation report, for the purposes if an in camera review only, to any party demonstrating probable cause exists, based on independent knowledge, that an exception under subsection (3) or an exclusion under subsection (4) applies.<sup>316</sup> The court or administrative law judge can limit the access to all or part of the report and impose conditions necessary to protect confidentiality. Furthermore, this subsection prohibits a party gaining access to the report from divulging any information except as specifically allowed by the court or hearing officer.

Subsection (5)(b)(T) imposes liability on a party or any other person who divulges or disseminates any information in a self-evaluation report in violation of this subsection. The liability created by this subsection covers any damages caused by the divulgence or dissemination that are incurred by the entity or person for whom the report was prepared.

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<sup>316</sup> See COLO. REV. STAT. § 13-25-126.5(5)(a).

While Mississippi followed the liability provision, it did not adopt subsection (5)(b)(II) of the Colorado law. This latter subsection makes it a class 1 misdemeanor for any public entity, public employee, or public official to divulge all or part of any information contained in an audit report in violation of subsection (5). A court could also find the public entity, employee, or official in contempt and, as could an administrative law judge, assess a penalty not to exceed ten thousand dollars.

Colorado included the No Interference provision of the Oregon statute in subsection (6). Under subsection (7), the burden of proof allocation differs from the Oregon law, in that the party asserting the privilege must establish a “prima facie case as to the privilege.”<sup>317</sup> On the other hand, the party seeking the report bears the burden of proving that the privilege does not exist. Arguably, this may be interpreted to mean the owner or operator does not have to prove satisfactory corrective action.

In a unique provision, Colorado specified in subsection (8) that the existence of an audit report shall be subject to discovery, notwithstanding the fact that the contents of the report remain privileged. Subsection (9) also adds a different clause from the Oregon law by including a sunset provision. The act applies only to voluntary self-evaluations performed during the period beginning June 1, 1994 and ending June 30, 1999.

The Colorado audit law also broke new ground by creating a presumption against imposing administrative, civil, or criminal penalties against regulated entities making a voluntary disclosure of information resulting from a self-evaluation. A disclosure of audit information to the state public health and environment department qualifies as “voluntary” if all of the following condition are met:

1. Prompt - the person or entity promptly discloses the information after learning about it;
2. Derivative - the disclosure arises out of a voluntary self-evaluation;
3. Satisfactory Correction - the person or entity initiates the appropriate effort to achieve compliance, pursues compliance with due diligence, and corrects the noncompliance within two years after completing the voluntary self-evaluation ( submitting a complete permit application within a reasonable time period constitutes appropriate corrective action for noncompliance through failure to obtain a permit); and
4. Cooperation - the person or entity cooperates with the regulatory department regarding the investigation of the issues identified in the disclosure.<sup>318</sup>

If the two year period is not practical, subsection (2) provides that the regulatory department has discretion to approve an application for extending the time period to correct noncompliance. A regulated entity may request de novo review of the department's decision by a court or administrative law judge. Subsection (3) excepts from voluntary disclosures, any disclosure required to be made under a specific permit condition or under an order issued by the regulatory department.

Under subsection (4), voluntary disclosure of a violation to the regulatory department raises a rebuttable presumption that the disclosure is voluntary [the statute contains this circuitous language]. Consequently, the regulated entity receives immunity from any administrative and civil penalties "associated with the issues disclosed" and from criminal penalties for "negligent acts associated with the issues disclosed."<sup>319</sup> To receive this protection, the person or entity must provide information supporting its claim of voluntariness when making the disclosure.

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<sup>317</sup> See COLO. REV. STAT. § 13-25-126.5(7).

<sup>318</sup> See COLO. REV. STAT. § 25-1-114.5(1).

<sup>319</sup> See COLO. REV. STAT. § 25-1-114.5(4).

According to subsection (5), the regulatory department can rebut the presumption of a voluntary disclosure, by showing to a state commission or board of health that the disclosure was involuntary based on the factors specified in subsections (1), (2), or (3). The decision by the commission or board of health constitutes final agency action. This subsection also provides that, unless the commission or board of health finds the presumption rebutted, the regulatory department cannot include any administrative or civil penalty or fine or any criminal penalty or fine for negligent acts in a notice of violation or in a cease and desist order related to the underlying violation. Thus, subsection (5) places the burden of proof on the regulatory department to rebut the presumption of voluntariness.

If a court or administrative law judge has found a person or entity “to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations , permit conditions, settlement agreements, or orders on consent and that were due to separate and distinct events giving rise to the violations” during the three years prior to disclosure, the protection from administrative, civil, or criminal penalties does not apply according to subsection (6).<sup>320</sup> This provision also recognizes that multiple settlement agreements, relating to substantially the same alleged violations involving serious instances of noncompliance within the previous three years, demonstrates a pattern of continuous or repeated violations sufficient to extinguish any immunity.

Placing another limitation on the immunity granted by the act, subsection (7) provides that it does not affect any other authority of the regulatory department, beyond

that explicitly addressed, to order any action in response to the information contained in a voluntary disclosure. Subsection (8) adopts the definitions of the environmental audit amendment to the evidence code, and subsection (9) contains the same time window during which the protections apply.

Incidentally, as does Mississippi, Colorado lists the following circumstances, among others, the court must consider as grounds for reducing or eliminating a civil penalty for an environmental violation: (1) the voluntary and complete disclosure in a timely fashion of the noncompliance after discovery by the regulated entity; (2) full and prompt cooperation by the regulated entity, including entering into a legally enforceable commitment to undertake compliance and remedial efforts; and (3) the existence and scope of a routine and comprehensive environmental compliance or audit program.<sup>321</sup>

## 2. Kentucky.

The 1994 version of Kentucky's environmental audit law provided only privileged protection,<sup>322</sup> which the legislature amended in 1996 to include limited immunity for voluntary disclosure.<sup>323</sup> Subsection (1) adopts the same definitions for "environmental audit" and "environmental audit report" as the Oregon act. It defines "voluntary disclosure" to mean "the prompt reporting to the cabinet by the owner or operator of a facility of the voluntary discovery of a violation of this chapter or the administrative regulations promulgated pursuant thereto prior to:

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<sup>320</sup> See COLO. REV. STAT. § 25-1-114.5(6).

<sup>321</sup> See COLO. REV. STAT. § 25-7-122(2)(b)(I)-(III).

<sup>322</sup> See KY. REV. STAT. ANN. § 224.01-040 (Michie Supp. 1994)

<sup>323</sup> See 1996 KY S.B. 281, Reg. Sess. (enacted Apr. 4, 1996).

1. The commencement of a federal, state, or local agency inspection or investigation, or the issuance by that agency of an information request to the owner or operator of the facility;
2. The filing of a notice of a citizen suit filed under federal or state law;
3. The filing of a complaint by a third party;
4. The reporting to a federal, state, or local agency of the violation by an employee who is not authorized to speak on behalf of the facility; or
5. The imminent discovery of the violation by a regulatory agency.<sup>324</sup>

Subsection (1)(d) defines “voluntary discovery” to mean “the discovery of a violation of this chapter or the administrative regulations promulgated pursuant thereto by the owner or operator of a facility if: (1) The violation was discovered by an environmental audit; and (2) The violation was not identified through a legally mandated monitoring or sampling requirement prescribed by statute, administrative regulation, permit, judicial or administrative order, agreed order, consent decree, or plea bargain.”<sup>325</sup>

In subsections (3) and (4)(a), Kentucky provided the same privilege for audit reports, as well as the same express and implied waiver provision, as the Oregon law. As an additional exception to the privilege, subsection (4)(b) specifies that by seeking to introduce a report as evidence, including any part of the report, the owner or operator waives the privilege for the entire report. Subsections (4)(c) and (d) contains identical provisions as the Oregon statute for requiring a court to order disclosure, after an in camera review, in a civil or administrative proceeding and in a criminal proceeding, respectively. The only difference between the two laws on this point is that, in a criminal

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<sup>324</sup> See KY. REV. STAT. ANN. § 224.01-040(1)(c).

<sup>325</sup> See KY. REV. STAT. ANN. § 224.01-040(1)(d).

proceeding, Kentucky only requires that the prosecutor “has a need” for the information, rather than the Necessary Circumstances provision of the Oregon law.<sup>326</sup>

In effect, subsection (4)(e) divides the burden of proof the same way as does the Oregon act. Also in consonance with the Oregon law, subsection (5)(a) grants prosecutors the Probable Cause authority to seize the report and imposes the same corresponding restrictions. Subsection (5)(b) varies slightly by providing only twenty days for the owner or operator to file a petition requesting a hearing. While subsection (5)(c) contains the same directive for the court to issue Scheduling and Protective orders, it reduces the time period from 45 days to 30 days. Subsections (5)(d) and (e) also match the Oregon law by including the Stipulation and Relevant Disclosure provisions.

While subsection (6) adopts automatic exclusions identical to the Oregon statute for Required Information, Agency Obtained Information, and Independent Information, it also denies the privilege to any information developed that relates to any release subject to KRS 224.01-400(19). Kentucky adopted the No Interference provision of the Oregon law in subsection (7). As an additional limitation of the privilege, subsection (8) specifies that the law does not limit, waive, or abrogate any environmental reporting requirement or permit condition, a provision similar to the Illinois statute. Subsection (9) contains another variation by providing that a report will not be privileged in criminal proceeding if it has been found subject to disclosure in a civil or administrative proceeding.

The immunity provision for voluntary disclosures found in subsection (10) does not apply to criminal penalties, which differs from the Colorado act’s coverage of

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<sup>326</sup> See KY. REV. STAT. ANN. § 224.01-040(4)(d)(4).

criminal negligence violations. This subsection forbids the regulatory agency from seeking a civil penalty against a facility for an environmental violation under Kentucky law if all of the following conditions are met:

1. Voluntary Disclosure - the owner or operator voluntarily discloses the violation to the regulatory agency after making a voluntary discovery;
2. Satisfactory Correction - the owner or operator corrects the violation within 60 days of the voluntary discovery, unless a shorter period of time is necessary to protect human health, safety, or the environment, or the regulatory agency determines that a longer period of time is necessary to correct the violation and approves a longer period of time and the owner or operator is taking the steps necessary to correct the violation as soon as possible;
3. Preventive Action - the owner or operator agrees in writing to take steps to prevent a recurrence of the violation;
4. Not Repeated - the specific violation, or closely related violation:
  - a. Has not occurred at the facility within the past three years;
  - b. Is not part of a pattern of violations of federal, state, or local law occurring within the past five years as identified in a judicial or administrative order, consent agreement, or agreed order, complaint, notice of violation, conviction, or plea agreement; and
  - c. Is not an act or omission for which the facility has received penalty mitigation from a federal, state, or local agency;
5. Not Serious - the violation did not result in serious actual harm, present an imminent and substantial endangerment to human health or the environment, or violate the terms of a judicial or administrative order, consent decree or agreed order, or plea agreement; and
6. Cooperation - the owner or operator of the facility cooperates as requested by the regulatory agency and provides information as necessary to determine the applicability of this protection.

This subsection does not contain the Colorado exclusion for disclosures required to be made by a permit condition or administrative order.

In the subsection (11), Kentucky limits the scope of the privilege and immunity further by specifying that nothing in the act shall be construed to abridge the right of any person to recover actual damages resulting from any violation.

### 3. Idaho.

In 1995, Idaho enacted the Environmental Audit Protection Act, which provides privilege and immunity, as well as strengthens confidential business protections, for persons conducting an environmental audit<sup>327</sup> Subsection 803 defines “persons” to exclude state and federal governmental entities and their respective contractors.<sup>328</sup> This subsection also provides definitions for “environmental audit”,<sup>329</sup> environmental audit report”,<sup>330</sup> and “in camera review”.<sup>331</sup> As the Colorado statute provides, Idaho adopted a

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<sup>327</sup> S.B. 1142, 53rd Leg., 1st Sess. (1995)(to be codified at IDAHO CODE §§ 9-801 to -811, § 9-340)(enacted Mar. 22, 1995) (as amended by H.B. 862, 53rd Leg., 2nd Sess. (1996)).

<sup>328</sup> See IDAHO CODE § 9-803(6) (defined to mean “any individual, firm, association, partnership, joint stock company, trust, estate, local governmental entity, public or private corporation, or any other legal entity which is recognized by the law as the subject of rights and duties, but does not include any state or federal governmental entity or its contractors and/or subcontractors in the performance, operation or management of governmental activities, programs, functions, facilities or sites.”).

<sup>329</sup> See IDAHO CODE § 9-803(3) (defined to mean “an internal evaluation done pursuant to a plan or protocol that is designed to identify and prevent noncompliance and to improve compliance with statutes, regulations, permits and orders. An environmental audit may be conducted by an owner or operator, by an owner or operator’s employees or by an independent contractor. An environmental audit may include: (a) one or more facilities; (b) any activity at one or more facilities; (c) impacts on one or more environmental media at a facility or facilities; or (d) management systems related to a facility, an activity or an impact on environmental media.”).

<sup>330</sup> See IDAHO CODE § 9-803(4) ( defined to mean “a set of documents, each labeled ‘Environmental Audit Report’ (or a substantive equivalent label), and prepared as a result of an environmental audit. An environmental audit report may include field notes, records of observation, findings, opinions, suggestions, implementation plans, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, data, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report may include memoranda and documents analyzing portions or all of the audit report.”).

<sup>331</sup> See IDAHO CODE § 9-803(7) (defined to mean “a hearing or review in a courtroom, hearing room or chambers, to which the general public is not admitted. After such hearing or review, the content of the oral and other evidence and statements of the judge, hearing officer and counsel shall be held in confidence by those participating in or present at the hearing or review, and any transcript of the hearing or review shall

sunset provision in the enacting legislation that makes the act null and void on December 31, 1997.

Although the findings and purposes language in the act uses the specific term of privilege, subsection 804 actually prohibits compelling disclosure of audit reports. The amended provision precludes any state public official, employee, or environmental agency from requiring the disclosure of an audit report from any person, except from any government entity, notwithstanding any other provision of law to the contrary. This clause differs remarkably from the other states' laws which provide a legal privilege, making such reports inadmissible in legal actions.

Idaho addressed the treatment of legally required information in a somewhat different manner also. Subsection 805 specifies that nothing in the act shall be construed to preclude a request for information, investigation or disclosure of information required to be disclosed under federal and state law, rule or regulation. Continuing along this particular approach, this subsection provides that documents, communications, data, reports, and other information, the collection, development, and reporting of which federal and state law directs, must be disclosed as mandated. In its practical effect, this provision seems to be similar to the other state audit statutes in the sense that it also excludes information other laws require regulated entities to provide or have available.

Subsection 806 resembles the Oregon statute by excepting expressly waived reports from the prohibition against compelled disclosure. Although it does not refer to implicit waivers, this subsection does limit the waiver to only the portions of the reports

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be sealed and not considered a public record until or unless its contents are disclosed by a court having jurisdiction over the matter.").

specifically waived. The Idaho law contains only the Fraud and Unqualified exceptions found in the Oregon act, but does require the determination to be made by a court or agency after in camera review. In stark contrast to the other audit laws, the Idaho statute does not seem to require the regulated entity to take satisfactory corrective action before it receives the privilege protection.

The burden of proof, as specified in subsection 803(3), falls on the party seeking the report to establish that the material sought does not qualify for the protection because it is not an appropriate subject for an environmental audit or the entity has asserted the privilege for a fraudulent purpose. The party asserting the privilege must show that a written environmental compliance policy exists or the adoption of a plan of action to comply with applicable environmental laws. Such evidence constitutes *prima facie* proof that the audit is protected from disclosure.

Subsection 807 contains automatic exclusions from the protection against compelled disclosure similar to the Oregon act for Required Information, Agency Obtained Information, and Independent Information. This subsection appears to complement subsection 805 discussed above. In subsection 808, Idaho adopted the No Interference provision found in the Oregon law.

Following the basic approach used by Colorado, Idaho created a rebuttable presumption form of immunity in subsection 809 for a voluntary disclosure of noncompliance found by an environmental audit. Subsection 809(1) provides, "Any person that makes a voluntary disclosure of an environmental audit report, or relevant portions thereof, which identifies circumstances which may constitute a violation of any state environmental law to the appropriate environmental agency, shall be immune from

state prosecution, suit or administrative action for any civil or criminal penalties or incarceration for acts associated with the issues disclosed.” As with the Colorado and Kentucky statutes, this act provides immunity only for violations of the state environmental law. It varies from these other laws, by not excluding all criminal violations from the immunity protection, as does Kentucky, and by not limiting the protection to criminally negligent acts, as does Colorado.

Under subsection 809(2), unless rebutted, a disclosure is presumed voluntary upon satisfying all of the following conditions:

1. Timely Disclosure - the owner or operator discloses the information to the regulatory agency in a timely manner, after receiving the audit report;
2. Derivative - the disclosure arises out of an environmental audit; and
3. Satisfactory Correction - the owner or operator immediately initiates appropriate efforts to achieve compliance, pursues compliance with due diligence, and expeditiously achieves compliance within a reasonable period of time after completing the audit.

This provision varies from the other state immunity statutes by not specifying a certain time period for achieving compliance.

Idaho included the Permit Corrective Action provision of the Colorado law in subsection 809(3). The next subsection adds a unique clause, “A person may, but is not required, to enter into a voluntary consent order with the environmental regulatory agency to achieve compliance.”<sup>332</sup> Under subsection 809(5), disclosures required by law or a specific permit condition are not deemed “voluntary” and, thus, do not qualify for the immunity shelter. This disqualifying provision follows the Colorado law to a certain extent, but differs from the Kentucky act which does not contain this exclusion.

In subsection 809(6), Idaho adopted the provision of the Colorado law disqualifying repeated violations from immunity with a slight variation. A regulated entity loses the immunity protection only if a court, not an administrative law judge, has found the commission of serious violations within the preceding three years. The “pattern of violations” language, including that demonstrated by multiple settlement agreements, remains the same.

Slightly different from the Colorado act but in the same vein, subsection 809(7) states that this law does not, except as specifically provided, affect the regulatory agency’s authority to require remedial action through a consent order or court proceedings, or to abate an imminent hazard, associated with information voluntarily disclosed. Subsection 810(1) provides the regulatory agency authority to further define an environmental audit, set timetables for remedial actions, and adopt rules covering the treatment of audit reports and confidential business information. In effect, the act allows the agency to establish time periods for corrective action rather than specify time limits in the statute, as did Colorado. As an example, the Idaho regulatory agency adopted a rule specifying that the regulations are not intended to protect entities that willfully violate environmental laws.<sup>332</sup>

Also different from the Colorado law, subsection 810(2) authorizes the governor to disclose information in a report, except trade secrets, in circumstances deemed to present an imminent and substantial danger to the public health or the environment. Under subsection 811, the legislature declared the provisions of this act to be severable,

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<sup>332</sup> See IDAHO CODE § 9-809(4).

<sup>333</sup> See IDAPA 37.01.02, Rules of the Idaho Dept. of Water Resources (Rule 1).

thereby, protecting the remaining portions of the statute, if any provision of the act or the application of such provision to any person or circumstance is declared invalid.

#### 4. Kansas.

Also in 1995, Kansas enacted its audit law which provides both privilege and immunity safeguards.<sup>334</sup> In subsection 3332, the terms "audit" and "audit report" have the same meaning as defined by the Oregon law, except Kansas added that nothing in the section shall be interpreted to authorize uninterrupted or continuous auditing.<sup>335</sup>

Subsection 3333 provides the same privileged protection to reports as found in the Oregon law. Differing from the Oregon act, this subsection adds a prohibition against compelling testimony from either a person who conducted an audit or anyone to whom the results were disclosed regarding any matter which was the subject of the audit and which a privileged part of the report addresses, unless subsection 3334 applies.

Under subsection 3334(a), the owner or operator can waive the privilege. The act does not refer to either an express or an implicit waiver. Disclosing the report or information generated by the audit, pursuant to subsection 3334(b), to an employee, legal representative or independent contractor retained by the owner or operator to address problems raised by the audit, does not waive the privilege. Nor does the owner or operator waive the privilege by disclosing the report or information generated by the audit, under the express terms of a confidentiality agreement, to a prospective purchaser or governmental official, according to subsection 3334(c).

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<sup>334</sup> See KAN. STAT. ANN. §§ 60-3332 to -3339 (1995).

<sup>335</sup> See KAN. STAT. ANN. § 60-3332(a).

Pursuant to subsection 3334(d), a court or administrative tribunal in a civil, criminal, or administrative proceeding, after in camera review, must order the disclosure of audit material upon determining:

1. Fraud - the privilege is asserted for a fraudulent purpose;
2. Compliance Management System Absent - the party asserting the privilege failed to implement a management system to assure compliance with environmental laws. A management system satisfies the act's requirements, depending on the nature of the entity including its size, its financial resources and assets, and the environmental risks posed by its operations, and based on a qualitative assessment of the totality of the circumstances, if the system possesses the following primary characteristics:
  - a. The system covers all parts of the entity's operations regulated under one or more environmental laws;
  - b. The system regularly takes steps to prevent and remedy noncompliance;
  - c. Senior management supports the system;
  - d. The system implemented includes policies, entity standards, and procedures that emphasize the importance of assuring compliance with all environmental laws;
  - e. The entity communicates its policies, standards, and procedures effectively to everyone whose activities could affect compliance achievement;
  - f. The entity assigns responsibility to oversee compliance with such standards and procedures to specific individuals within both high-level and plant- or operational-level management;
  - g. The entity undertakes regular review of its compliance status, including routine evaluation and periodic auditing of day-to-day monitoring efforts, to evaluate, detect, prevent, and remedy noncompliance;
  - h. The entity provides a reporting system which employees can use without fear of retribution to report unlawful conduct within the organization; and
  - i. The entity enforces its standards and procedures to ensure compliance through appropriate employee performance, evaluation and disciplinary mechanisms;
3. Unqualified - the material is not subject to the privilege; or
4. Unsatisfactory Corrective Action - the material indicates noncompliance, even if subject to the privilege, but the entity fails to promptly initiate and pursue

with reasonable diligence appropriate effort to achieve compliance upon discovering a violation.<sup>336</sup>

The characteristics identified in this subsection resemble those discussed above which DOJ considers under its policy.

Subsection 3334(e)(1) imposes the same burden of proof on the party asserting the privilege as allocated in the Oregon act, which includes establishing the appropriate Compliance Management System. In a slight variation from the Oregon law, subsection 3334(e)(2) requires the party seeking to prove the Fraud exception or that the entity asserted the privilege to prevent disclosure of past noncompliance. In a criminal proceeding, this subsection shifts the burden of proof to the state to show the material is not subject to the privilege.

Following the Oregon statute exactly, subsection 3335 provides Probable Cause authority to prosecutors in criminal investigations, grants the owner or operator the Thirty Day Petition right, and directs the court to issue Scheduling and Protective orders, including Limited Access and Restricted Use. Subsection 3335(d) specifies, in a unique provision, that failure to comply with the disclosure and use prohibition outlined in the act, shall constitute grounds for the suppression of any evidence arising out of or derived from the unauthorized review, disclosure, or use. In subsections 3335(e) and (f), Kansas adopted the Stipulation and Relevant Disclosure provisions of the Oregon act.

Subsection 3336 recognizes the same automatic exclusions from the privilege as the Oregon law for Required Information, Agency Obtained Information, and

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<sup>336</sup> See KAN. STAT. ANN. § 60-3334(d).

Independent Information. Also in accordance with the Oregon statute, subsection 3337 contains the No Interference provision.

Adopting the rebuttable presumption approach taken by Colorado, subsection 3338(a) grants immunity from administrative, civil, and criminal penalties for voluntary disclosure of a violation of environmental law, provided the disclosure is:

1. Prompt - made promptly after the person or entity detects the violation;
2. To Regulator - made to the appropriate regulatory agency;
3. Derivative - arises out of an audit; and
4. Satisfactory Corrective Action - one which the person or entity initiates action in a diligent manner to resolve the violations identified; and
5. Cooperation - one which the person or entity cooperates with the appropriate agency regarding the investigation of the issues identified in the disclosure.

This provision differs from the immunity granted by Colorado by not limiting its protection to criminally negligent violations and, therefore, follows the Idaho act. In addition, it appears to only require the initiation of corrective action, rather than completed correction of the noncompliance within a certain time period. The next subsection addresses this matter.

Under subsection 3338(b), if state law requires the information to be reported to a regulatory authority, the disclosure is not voluntary. Although this subsection does not include information required by a permit to be reported, it otherwise matches the Idaho law.

Penalties may be imposed under state law, when the presumption is rebutted by establishing the following conditions pursuant to subsection 3338(c):

1. Involuntary Disclosure - the disclosure was not voluntary;

2. Intentional and Willful Act - the person or entity intentionally and willfully committed the violation;
3. Unsatisfactory Correction - the person or entity failed to fully correct the violation in a diligent manner; or
4. Harm or Endangerment - the violation caused a significant environmental harm or a public health threat.<sup>337</sup>

Although this subsection eliminates immunity protection for intentional and willful acts, it still does grants more refuge than the Colorado law because it does not exclude violations resulting from reckless actions.

Subsection 3338(d)(1) allocates the burden of proof concerning voluntariness by requiring the person or entity claiming the voluntary disclosure to establish a *prima facie* case. Once the evidence shows a *prima facie* case, the opposing party has the burden of rebutting the presumption by a preponderance of the evidence under subsection 3338(d)(2). Setting an actual standard of proof distinguishes the Kansas statute from most of the other audit law.

Another peculiar feature of the Kansas act is found in subsection 3339. Rather than placing the provision in the penalty sections of its environmental laws, this state added to the environmental audit statute a specification that a court or administrative tribunal that finds a violation of state law shall consider, when deciding whether to impose administrative, civil, or criminal penalties, the fact that a person or entity has implemented an environmental management system. The court or administrative tribunal must also consider this fact in determining the severity of any penalty imposed. This paper will refer to this provision as the Penalty Consideration provision.

## 5. Minnesota.

Also in 1995, Minnesota enacted legislation establishing its Environmental Improvement Pilot Program, which offers limited privilege and limited immunity for an environmental audit or self-evaluation.<sup>338</sup> Due to the sunset provision included in the law, the test program expires July 1, 1999.<sup>339</sup> Section 9 of the act contains definitions for key terms, such as "environmental audit"<sup>340</sup> and "self-evaluation".<sup>341</sup> Under subsection 9(10), a "regulated entity" includes both public and private organizations subject to environmental requirements, which presumably would cover federal and state governmental entities.

To be eligible for participating in the program, subsection 10(1) requires that at least one year has elapsed without the initiation of an enforcement action against a facility that resulted in penalty being imposed. This subsection also mandates that the regulated entity:

1. Conduct an environmental audit or self-evaluation;
2. For a major facility, as defined under the program, prepare a pollution prevention plan and submit progress reports as required by state law;

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<sup>337</sup> See KAN. STAT. ANN. § 60-3338(c).

<sup>338</sup> See 1995 Minn. Sess. Law Serv. Ch. 168 (H.F. 1479) (enacted May 17, 1995) (amending MINN. STAT. § 115B.03 (1994)) (as amended by 1996 Minn. Sess. Law Serv. Ch. 359 (H.F. 3013)(West)).

<sup>339</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 19 (H.F. 1479).

<sup>340</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 9(4) (H.F. 1479) (defined to mean "a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements and, if deficiencies are found, a plan for corrective action. The final audit document must be designated as an 'audit report' and must include the date of the final written report of finding for the audit.").

<sup>341</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 9(11) (H.F. 1479) (defined to mean "a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements, based upon an evaluation form prescribed or approved by the commissioner.").

3. For other facilities, examine pollution prevention opportunities at the facility; and
4. Submit a report in accordance with subsection 10(2).<sup>342</sup>

Subsection 10(2) requires a regulated entity to submit a report to the commissioner, and to the local government if a violation of local law occurred, within forty-five days of completing the self-evaluation or after the date of the final written report of findings for an environmental audit. This subsection sets forth the following items the report must include:

1. Certification - a certification by the owner or operator of the facility that the four requirement listed above have been satisfied;
2. Complete Disclosure - a disclosure of all violations identified in the environmental audit or self-evaluation and a brief description of proposed corrective actions;
3. Commitment - a commitment signed by the owner or operator to correct the violations as expeditiously as possible under the circumstances;
4. Time Limit - if the corrective action requires more than 90 days to complete, a performance schedule indicating the time needed to correct the violation and a brief justification supporting the time periods set forth in the performance schedule; and
5. Prevention - a description of the steps taken or that will be taken to prevent recurrence of the violation.<sup>343</sup>

Subsection 11 directs the commissioner to publish quarterly the names and locations of the facilities submitting reports under subsection 10(2) and, if applicable, the proposed time period in the performance schedule for completing the corrective action.

Under subsection 12(a), the commissioner must approve a reasonable performance schedule. This subsection also requires the commissioner to take into

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<sup>342</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 10(1) (H.F. 1479).

account, when reviewing the reasonableness of a performance schedule, information supplied by the regulated entity, any public comments, and information developed by the state agency. The commissioner must base the decision about the reasonableness of the performance schedule on the following factors:

1. The nature of the violation(s);
2. The environmental and public health consequences of the violation(s);
3. The economic circumstances of the facility;
4. The availability of equipment and material; and
5. The time needed to implement pollution prevention opportunities as an alternative to pollution control approaches to correct the violation(s).<sup>344</sup>

In addition, this subsection specifies that information submitted to the commissioner is nonpublic data under Minnesota law if it meets the definition of trade secret information.

This clause is similar to the Mississippi law.

If a dispute arises over approval of the performance schedule, subsection 12(b) authorizes the regulated entity to request a hearing under Minnesota law. This subsection also permits the commissioner and the regulated entity to amend the performance schedule by written agreement.

Subsection 13(1) mandates that the state must defer enforcement of an environmental requirement against the owner or operator of a facility for at least 90 days, if the owner or operator submits a satisfactory report under subsection 10(2) to the commissioner. Under this subsection, if the report contains a performance schedule, which the commissioner approves, the state must defer enforcement action for the time

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<sup>343</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 10(2) (H.F. 1479).

period specified in the approved schedule, as long as the owner or operator meets each interim performance date included in the schedule.

Correcting the violations identified in the audit or self-evaluation and certifying this achievement to the commissioner within ninety days after the commissioner receives the report required by subsection 10(2) or within the time period specified in an approved performance schedule qualifies the owner or operator for a penalty waiver under subsection 13(2). This provision prohibits the state from imposing any administrative, civil, or criminal penalty, or bringing an action seeking such a penalty, for violations the owner or operator reports.

Subsection 13(3) lists the exceptions to the deferred enforcement and penalty waiver provisions. It permits the state to bring, at any time:

1. Criminal Action - a criminal enforcement action against any person for knowingly committing a violation of Minnesota Statutes, section 609.671;
2. Civil or Administrative Action - a civil or administrative enforcement action, including a penalty, under Minnesota Statutes, sections 115.071 or 116.072, against the owner or operator of a facility on the following conditions:
  - a. Recurrence - less than one year has elapsed since a notice of violation, an administrative penalty order, or a civil or criminal lawsuit was finally resolved in an enforcement action against the owner or operator for violating the same environmental requirement identified in the report required by subsection 10(2); or
  - b. Harm - the violation caused serious harm to the public health or environment; or
3. Injunctive Action - the enforcement action seeks to enjoin an imminent threat to the public health or the environment.<sup>345</sup>

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<sup>344</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 12(a) (H.F. 1479).

<sup>345</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 13(3) (H.F. 1479).

Similar to the Colorado law, this subsection does not limit the regulatory agency from taking legal action to protect public health and the environment; however, it differs in that it excludes only knowing criminal acts.

Minnesota followed the Kansas approach of placing the Penalty Consideration provision in the environmental audit law. Under subsection 13(4), the state, if it finds an exception under subsection 13(3) applies, must consider the regulated entity's good faith efforts to comply with environmental requirements when determining whether to pursue an enforcement action, whether the action should be civil or criminal, and the amount of the penalty to impose, if any. This subsection requires the state to evaluate the good faith efforts of a regulated entity using the following factors:

1. The timeliness of the corrective action taken by the regulated entity upon discovering the noncompliance;
2. The exercise of reasonable care by the regulated entity in attempting to prevent the violations and ensure compliance with environmental requirements;
3. The significance of any economic benefit to the regulated entity resulting from the noncompliance;
4. The regulated entity's history of good faith efforts to comply with environmental requirements, prior to implementing its audit or self-evaluation program;
5. The good faith efforts demonstrated by the regulated entity after it implemented an auditing or self-evaluation program; and
6. The regulated entity's efforts to implement pollution prevention opportunities.<sup>346</sup>

Under subsection 13(5), if the state discovers any violations prior to the regulated entity submitting a report to the commissioner under subsection 10(2), it may take any

authorized enforcement action notwithstanding this act. Subsection 13(6) prohibits a person from knowingly making a false material statement or representation in the report filed under subsection 10(2). This subsection subjects a person found to have knowingly made a false material statement or representation to the administrative penalties and process set forth in Minnesota Statutes, section 116.072. If the regulated entity satisfies certain conditions, subsection 14 authorizes it to display a "green star" emblem designed by the commissioner.

Subsection 15(1) prohibits the state from requesting, inspection, or seizing the final audit report, draft audit papers, self-evaluation form, notes or papers prepared by the auditor or person performing the self-evaluation which are related to the audit or self-evaluation, or the regulated entity's internal documents establishing, coordinating, or responding to the audit or self-evaluation, other than the report required by subsection 10(2), except in accordance with the environmental auditing policy adopted by the agency on January 24, 1995. Under subsection 15(2), this same information is privileged as to all other persons provided the regulated entity complies with its commitments under subsections 10 and 12.

Minnesota embellished the No Interference provision of the Oregon law in subsection 15(3), by specifying that a regulated entity participating in the environmental improvement program does not "waive, minimize, reduce, or otherwise adversely affect the level of protection or confidentiality that exists, under current or developing common or statutory law, with respect to any other documents relating to an environmental audit

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<sup>346</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 13(4) (H.F. 1479).

or self-evaluation.”<sup>347</sup> Under subsection 16, the act does not affect, impair, or alter the rights of regulated entities that are not eligible for or choose not to participate in the program, or the rights of other persons relating to matters the program addresses.

Similar to the Illinois law, subsection 17 provides that the act does not relieve a regulated entity from the obligation to report releases, violations, or other matters required to be reported by state or federal law, rule, permit, or enforcement action. Under subsection 18, the rights and protections created by the act survive its repeal with regard to reports filed under subsection 10(2) prior to July 1, 1999.

The Minnesota law contains a provision very central to this thesis. Subsection 20 requires the commissioner, in conjunction with the attorney general, to submit a report evaluating the effectiveness of the environmental improvement pilot program and recommending whether the program should be extended. The chairs of the environment and natural resources committees of the house of representatives and the senate must receive the commissioner’s report by January 15, 1999.

## 6. Texas.

Expanding the Colorado approach to environmental auditing protections, Texas passed its statute in 1995, which covers compliance assessments of health and safety laws in addition to environmental laws.<sup>348</sup> Subsection 3(a) provides definitions of key terms, such as “environmental or health and safety audit”,<sup>349</sup> “penalty”,<sup>350</sup> and “person”.<sup>351</sup>

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<sup>347</sup> See 1995 Minn. Sess. Law Serv. Ch. 168, § 15(3) (H.F. 1479)

<sup>348</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc (West 1996).

<sup>349</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(a)(3) (West 1996) (defined to mean “a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or

Whether a governmental entity qualifies as a person under this law depends on whether it is considered a “legal entity” which the statute does not define.

Section 4 contains a very broad description of an audit report, which includes all documents and communications produced by an environmental or health and safety audit, except for material excluded by section 8. A completed audit report may contain, under subsection 4(b)(1), the report prepared by an auditor, monitor, or similar person, which covers the description of the audit’s scope; any information gained from the audit or its findings, conclusions, and recommendations; and exhibits and appendices. Pursuant to subsection 4(b)(2), the report may also include memoranda and documents analyzing all or a portion of the other materials in the report or discussing implementation issues. In addition, subsection 4(b)(3) allows the report to also incorporate an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance.

Under subsection 4(c), the report may contain, as exhibits and appendices, supporting information collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including interviews with current or former employees; field notes and records of observation; findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda; legal analyses; drawings; photographs; laboratory analyses and other analytical data; computer-generated or

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operator, or an independent contractor of (A) a regulated facility or operation; or (B) an activity at a regulated facility or operation.”).

<sup>350</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(a)(5) (West 1996) (defined to mean “an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation of a statute or rule. The term does not include a technical or remedial provision ordered by a regulatory authority.”).

<sup>351</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(a)(6) (West 1996) (defined to mean “an individual, corporation, business trust, partnership, association, and any other legal entity.”).

electronically recorded information; maps, charts, graphs, and surveys; and other communication associated with the audit. Although subsection 4(d) encourages regulated entities to label the audit report, "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or use words of similar import, failure to label a document does not waive the privilege or create a presumption that the privilege does not apply.

Subsection 4(e) requires completion of the audit within a reasonable amount of time not to exceed six months from initiation. However, this subsection does allow the appropriate regulatory entity to approve an extension based on reasonable grounds.

Subject to the exceptions specified in sections 6, 7, 8, and 9 of the act, any part of an audit report is privileged under subsection 5(b) and not admissible as evidence or subject to discovery in any legal or equitable civil action, criminal proceeding, or administrative proceeding. Subsection 5(c) prohibits compelling a person, when called or subpoenaed as a witness, to testify or produce a document related to the audit if:

1. The testimony or document reveals any material described in section 4 that was made in preparation of an audit report and that a privileged part of the report addresses; and
2. The person, for purposes of this subsection only,:
  - a. Conducted any portion of the audit but did not personally observe the physical events;
  - b. Received disclosure of the audit results pursuant to subsection 6(b); or
  - c. Acts as the custodian of the audit results.<sup>352</sup>

Subsection 5(d) allows any person who actually observed the physical event of a violation to testify about that experience, but still prevents the compulsion of their testimony about privileged material related to the report or its preparation, as long as they

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<sup>352</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(c) (West 1996)

conducted or participated in the preparation of the audit. The Colorado audit law omits the exception for personal observations provided in this testimonial clause.

In another difference from the Colorado act, subsection 5(e) expressly prohibits an employee of a state agency from requesting, reviewing, or otherwise using an audit report when inspecting a regulated facility or activity. Texas did follow Oregon and Colorado in subsection 5(f) by placing the burden of proof on the party asserting the privilege to establish the applicability of the privilege.

Subsection 6(a) varies from the Oregon law, in that it recognizes only express, not implicit waivers of the privilege. Under subsection 6(b), Texas adopted a selective waiver provision similar to the Kansas act, but wider in scope. This subsection specifies that disclosure of an audit report or information generated by an audit does not waive the privilege under section 5, provided the disclosure is:

1. Internal - made for the purpose of addressing or correcting a matter raised by the audit and is made only to:
  - a. An employee of the owner or operator, including temporary and contract employees;
  - b. A legal representative of the owner or operator;
  - c. An officer or director of the regulated facility or operation or a partner of the owner or operator; or
  - d. An independent contractor retained by the owner or operator.
2. Business Matter - made pursuant to the terms of a confidentiality agreement between the person for whom the report was prepared or the owner or operator and:
  - a. A partner or potential partner of the owner or operator;
  - b. A transferee or potential transferee of the facility or operation;
  - c. A lender or potential lender for the facility or operation;
  - d. A governmental official or a state or federal agency; or
  - e. A person or entity that insures, underwrites, or indemnifies the facility or operation. or

3. Government - made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner.<sup>353</sup>

Putting teeth in the selective waiver provision, which the Kansas law lacks, subsection 6(c) imposes liability on a party who violates the confidentiality agreement by disclosing information, if the disclosure causes damages. Such a party is also liable for any penalties stipulated in the agreement.

Under subsection 6(d), information disclosed under subsection 6(b)(3) remains confidential and is not subject to the Open Government Public Information Required Disclosure act. This subsection also provides, as does the Colorado law, that a public entity, public employee, or public official who discloses information in violation of this subsection commits a Class B misdemeanor. However, the Texas law recognizes an affirmative defense if the report was not clearly labeled. If the public entity, employee, or official knew or had reason to know that the unlabeled report was a privileged audit report, the defense may not be raised.

Subsection 7(a) authorizes but does not require a court or administrative hearings official to require disclosure of a portion of the report in a civil, criminal, or administrative proceedings, after an in camera review, upon determining the Fraud exception, Unqualified exception, or the Unsatisfactory Corrective Action exception applies. Contrary to the Oregon law, subsection 7(b) imposes the entire burden of proof on the party seeking disclosure to establish these exceptions.

In another variation from the Oregon act, subsection 7(c) grants a person the right to directly appeal to a court of competent jurisdiction the decision of an administrative

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<sup>353</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(b) (West 1996)

hearings official regarding the application of the exceptions. The appeal can be made without disclosing the audit report to anyone unless so ordered by the court. In a unique provision, subsection 7(d) makes a person subject to sanctions under the civil procedural law of Texas if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information as specified in section 8. Subsection 7(e) provides for an interlocutory appeal of a determination by a court under that subsection.

Somewhat similar to the Oregon act, subsection 8(a) automatically excludes from the privilege Required Information (including that information covered by health and safety laws), Agency Obtained Information, and Independent Information. Subsection 8(b) specifies that the act does not limit the right of a person to agree to conduct and disclose an audit report.

Texas followed the Oregon law by granting prosecutors Probable Cause authority (identified as "reasonable cause" in the statute) in subsection 9(a). Section 9 contains the same procedures as the Oregon act involving the Thirty Day Petition right to the owner or operator, directing the court to issue Scheduling and Protective orders, and Limited Access to the report for preparation. Under subsection 9(f), the information used in preparation for the in camera hearing remains confidential, may not be used in any investigation or legal proceeding, and is not subject to disclosure under the Open Government Public Information Required Disclosure act. Subsection 9(g) removes these restrictions if the court finds the information subject to disclosure.

Similar to the Kansas law, subsection 9(h) requires the court or appropriate administrative official to suppress evidence offered in any civil, criminal, or administrative proceeding, on the motion of a party, if the evidence arises out of or is

derived from an unauthorized review, disclosure, or use of information obtained under section 9. The party allegedly failing to comply with section 9 bears the burden of proving the evidence offered is not tainted.

Subsections 9(i) and (j) contain the respective Stipulation and Relevant Disclosure provisions found in the Oregon act. Under subsection 9(k), a court may find a person in contempt for violating section 9 by disclosing information unlawfully and may order other appropriate relief.

Following the Colorado approach of a voluntary disclosure raising a Rebuttable Presumption of immunity, Texas developed a more intricate scheme in section 10. Subsection 10(a) grants immunity from administrative, civil, or criminal penalties if a person voluntarily discloses a violation of an environmental or health and safety law.

Under subsection 10(b), a disclosure is voluntary only when all of the following conditions are satisfied:

1. Prompt - the person promptly disclosed the information after learning of the violation;
2. To Agency - the person discloses the violation in writing by certified mail to the appropriate regulatory agency;
3. Before Agency Action - an agency with enforcement jurisdiction did not initiate an investigation of the violation or did not independently detect it before the disclosure by certified mail;
4. Derivative - the disclosure arises out of a voluntary audit;
5. Satisfactory Correction - the person initiates appropriate efforts to achieve compliance, pursues these efforts with due diligence, and corrects the noncompliance within a reasonable time;
6. Cooperation - the person cooperates with the appropriate agency in relation to an investigation of the issues identified in the disclosure; and

7. Harm - the violation did not injure one or more persons at the site or substantially harm persons, property, or the environment off-site.<sup>354</sup>

This subsection requires that the person actually correct the violation before receiving the immunity, which the Colorado act also requires. However, the Texas statute differs by not setting a definite time period, nor does it include the Permit Application clause of the Colorado law. Listing a Harm qualification makes the act somewhat similar to the Minnesota and Kentucky laws. Subsection 10(c) contains a slight variation from the Colorado provision by excluding reports required solely by a specific condition of an enforcement order or decree from the classification of voluntary disclosures.

According to subsection 10(d), the immunity protection does not apply and violators are subject to administrative, civil, or criminal penalties when:

1. The person making the disclosure intentionally or knowingly committed or was responsible under section 7.02, Penal Code, for the commission of the violation;
2. The person making the disclosure recklessly committed the violation or was responsible as specified above and the violation substantially injured one or more persons at the site or harmed persons, property, or the environment off-site;
3. A member of the person's management or an agent of the person committed the offense intentionally or knowingly and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation; or
4. A member of the person's management or an agent of the person committed the offense recklessly, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation substantially injured one or more persons at the site or harmed persons, property, or the environment off-site.<sup>355</sup>

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<sup>354</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 10(b) (West 1996)

<sup>355</sup> See TEX. REV. CIV. STAT. ANN. art. 4447cc § 10(d) (West 1996)

By excluding intentional and knowing violations, as well as some reckless violations, this subsection comes very close to the Colorado act's grant of limited immunity.

In subsection 10(e), Texas follows the Minnesota and Kansas approach of including a Penalty Consideration provision in the audit law. If a penalty is imposed under subsection 10(d), it should, to the extent appropriate, be mitigated by the following factors: the voluntariness of the disclosure, the disclosing party's efforts to conduct audits, remediation, cooperation with government officials investigating the disclosed violation, or other relevant considerations.

Subsection 10(f) allocates the burden of proof very similar to the Kansas act by requiring the party claiming immunity to establish a *prima facie* case of voluntary disclosure. In cases other than those under subsection 10(d), the enforcement authority bears the burden of rebutting the presumption by a preponderance of evidence or, in a criminal case, by proof beyond a reasonable doubt. The addition of the criminal standard of proof varies from the Kansas law.

In a unique provision, Texas mandates in subsection 10(g) that a facility conducting an audit must give notice to an appropriate regulatory agency that it plans to commence the audit in order to receive immunity protection. Such notice shall identify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. Under this subsection, the notice may specify more than one scheduled audit at a time.

Subsection 10(h) follows the Colorado act to a certain extent by excluding repeat violations from the shelter of immunity. The protection does not apply if a court or administrative law judge finds that the person claiming immunity has, after the effective

date of the act, demonstrated a pattern of disregard for environmental or health and safety laws through repeated or continuous commission of serious violations and by not attempting to bring the facility or operation into compliance. This subsection identifies a "pattern" as a series of violations due to separate and distinct events within a three year period at the same facility or operation. In contrast to the Colorado law, this provision does not include the Multiple Settlement Agreements language.

The Texas law in section 11, like the Indiana act, prohibits a regulatory agency from circumventing its purpose by adopting a rule or imposing conditions on regulated entities. Section 12 limits the applicability of the privilege protection to audits conducted on or after the effective date of the act, May 23, 1995. Texas adopted the No Interference provision of the Oregon law in section 13.

## 7. Utah.

Similar to its neighboring state of Colorado, Utah bifurcated the "Environmental Self-Evaluation Act" by enacting it as part of the statutory evidence code and as part of the state's environmental law.<sup>356</sup> The act initially provided only privileged protection to an "environmental audit report",<sup>357</sup> but was amended in 1996 to offer limited immunity

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<sup>356</sup> See UTAH CODE ANN. §§ 19-7-101 to -109 (enacted Mar. 20, 1995)(as amended by 1996 Utah Laws Ch. 91 (S.B. 149) (enacted Mar. 8, 1996)).

<sup>357</sup> See UTAH CODE ANN. § 19-7-103(2) (defined to mean "any document information, report, finding, communication, note, drawing, graph, chart, photograph, survey, suggestion, or opinion, whether in preliminary, draft, or final form, prepared as the result of or in response to an environmental self-evaluation.").

for voluntary disclosure following an “environmental self-evaluation”.<sup>358</sup> Nothing in the definition requires the audit report to be labeled in any particular manner.

Rule 508 of the Utah Rules of Evidence allows the person for whom an environmental self-evaluation was conducted or an audit report was prepared to refuse to disclose the report and to prevent any other person from doing so. Somewhat similar to the Colorado law, this rule provides that the existence of a report, but not its contents, is subject to discovery although not admissible as evidence in an administrative or judicial proceeding.

More elaborately than the other laws, subdivision 508(c) specifies who may claim the privilege. Not only the person for whom the self-evaluation was performed or the report written, but also that person’s guardian, conservator, personal representative, trustee, or successor in interest can assert the privilege. Under this subdivision, only the person for whom the report was prepared can waive the privilege. The rule also limits the power to waive a privilege belonging to a corporation, company, or other business entity, to the officers and directors who have the requisite management authority to act for the entity.

Under subdivision 508(d), the privilege does not exist in the following circumstances:

1. Waiver - if the person for whom the report was prepared expressly waives the privilege;
2. Fraud - if the privilege is asserted for a fraudulent purpose;

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<sup>358</sup> See UTAH CODE ANN. § 19-7-103(4) (defined to mean “a self-initiated assessment, audit, or review, not otherwise expressly required by an environmental law, that is performed to determine whether a person is in compliance with environmental laws. A person may perform an environmental self-evaluation through the use of employees or the use of outside consultants.”).

3. Avoidance - if the report was prepared to avoid disclosure of information in a compliance investigation or proceeding already underway and known to the person asserting the privilege;
4. Endangerment - if the information contained in the report must be disclosed to avoid a clear and impending danger to public health or the environment outside the site;
5. Unsatisfactory Corrective Action - if the report conclusively establishes noncompliance and, after the report, the person failed to initiate appropriate efforts to achieve compliance with environmental law within reasonable amount of time.
6. Available Information - if any law specifically requires the document or information to be available or furnished to a regulatory agency;
7. Agency Obtained Information - if the information is obtained by the regulatory department through observation, sampling, or monitoring; or [disjunctive mine]
8. Independent Information - if the regulatory department obtains the information through any source independent of the voluntary self-evaluation.<sup>359</sup>

While the Available Information exclusion is similar to the Colorado law, this subsection does not contain an express exclusion for Required Information as that provision is articulated in other audit laws. Whether this is a distinction without a difference may depend upon the specific facts of the violation.

Adopting a procedure dramatically different from the Oregon and Colorado laws, subdivision 508(e)(1) and its counterpart in the environmental code, subsection 106, require the party seeking the audit report to request a court to conduct an *in camera* review. Subdivision 508(e)(2) denies the party seeking the disclosure access to the report during the *in camera* review. Upon determining that part of the report is not privileged,

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<sup>359</sup> See 1995 Utah Laws S.J.R. 6 (UTAH R. OF EVID. 508(d)).

the court must order the disclosure of the nonprivileged portions under subdivision 508(e)(3)(A), but the remaining portions may not be disclosed.

Subdivision 508(f) imposes on the party asserting the privilege the burden of presenting a *prima facie* case, and the burden of showing the report is not privileged on the party seeking disclosure. Utah enacted the No Interference provision of the Oregon law in subdivision 508(g). According to subdivision 508(h), the rule applies to all administrative and judicial proceedings commenced on or after March 21, 1995.

Under subsection 104(1) of the environmental code, information divulged, disseminated, or otherwise disclosed in violation of Rule 508 may not be admitted as evidence in any administrative or judicial proceeding. Subsection 104(2) follows the Colorado and Texas laws to a certain extent by imposing liability on any person, including a regulatory employee or presiding hearing officer, for divulging or disseminating any information in a report in violation of Rule 508. Such persons are liable for any damages proximately caused by such an unauthorized disclosure. This subsection specifies that claims against a government employee under the act remain subject to the Utah Governmental Immunity Act.

Tracking the Colorado and Texas statutes, subsection 104(3) provides that a person, other than the person entitled to the privilege, who willfully divulges or disseminates any information from a privileged report is guilty of a class B misdemeanor, subject to a civil penalty not to exceed \$10,000, and subject to contempt penalties in a judicial proceeding. This subsection differs from the other two laws by excepting any information obtained or disseminated by a regulatory employee, an attorney representing

the department, a peace officer, criminal investigator, prosecuting attorney, court officer or their agents or staff when performing their duties.

In a unique provision, subsection 104(4) makes audit reports obtained through an in camera review a protected record under the Government Records Access and Management Act. This subsection prohibits a department employee or attorney representing the department from disclosing the report except as specified in the provisions in the other act. This could be interpreted to mean that, even when a court finds information in a report not privileged, an agency still must protect it under this provision.

Subsection 105 repeats the evidence rule making an audit report privileged under Rule 508 in any administrative proceeding. As noted above, subsection 106 outlines the same in camera review process as Rule 508. Although not as detailed as the Colorado and Texas laws, subsection 107(1) prohibits the examination of a person or an officer or employee of the person who performs a self-evaluation or assists in the preparation of an audit report or a consultant hired to perform the evaluation or prepare the report. This testimonial preclusion can be overcome by the consent of person for whom the self-evaluation was conducted or by a court ordering such testimony. Subsection 107(2) removes this obstacle if Rule 508 allows the self-evaluation or report to be discovered or admissible as evidence. As in the evidence code, subsection 108 contains the same effective date for its application.

Added in 1996, subsection 109 provides limited immunity for regulated entities as an incentive for voluntary disclosure and compliance.<sup>360</sup> Subsection 109(2) requires the regulatory department to waive civil penalties for violations of an environmental law or requirement under the following conditions:

1. Derivative - a regulated entity discovered the noncompliance through an environmental self-evaluation;
2. Timely Disclosure - a regulated entity voluntarily disclosed the noncompliance to the department in writing within ten days of discovering the violation;
3. Timely Correction - a regulated entity remedied or corrected the noncompliance within 60 days of discovering the violation, or within a reasonable amount of time if the violation cannot be remedied within 60 days; and
4. Prevention - the regulated entity submits to the department a written outline of reasonable steps it will take to prevent a recurrence.<sup>361</sup>

This subsection follows the Kentucky act by providing immunity for only civil penalties.

Subsection 109(3) prohibits the regulatory department from waiving civil penalties in the following circumstances:

1. Due Diligence Lacking - the noncompliance resulted from a lack of due diligence in complying with environmental laws, taking into account the size and nature of the regulated entity;
2. Repeated or Term Violation - the noncompliance is a recurrence of a similarly caused specific violation or a violation of the specific terms of a judicial or administrative consent order or agreement;
3. Reckless or Willful - the noncompliance resulted from reckless or willful disregard of environmental laws;

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<sup>360</sup> See 1996 Utah Laws Ch. 91 (S.B. 149) (§ 19-7-109 defines a “regulated entity” to mean “any person, business, or other entity subject to regulation under Title 19, Environmental Quality Code.”).

<sup>361</sup> See UTAH CODE ANN. § 19-7-109(2).

4. Fraud - the regulated entity conducted the self-evaluation for a fraudulent purpose;
5. Under Investigation - the department had already initiated a compliance investigation before the disclosure and the regulated entity was aware of or had been advised of the investigation;
6. Required Detection - the noncompliance was detected by a legally mandated monitoring, testing, or sampling requirement prescribed by law, rule, permit, order, or consent agreement; or
7. Harm or Endangerment - the noncompliance caused serious actual harm or an imminent and substantial endangerment to human health or the environment.<sup>362</sup>

In another variation from the Colorado law, subsection 109(4)(a) authorizes the department to seek a civil penalty to recover the monetary amount, resulting from noncompliance, of any economic benefit or competitive advantage over other similar regulated entities that did achieve compliance. Subsection 109(4)(b) provides that subsection 109(2) does not prohibit such action. In a brief version of the Penalty Consideration provision found in other audit laws, subsection 109(5) specifies that the act does not limit the department's discretion to reduce penalties for noncompliance in instances that do not fully qualify for the limited immunity, but in which the department decides merit an appropriate reduction.

## 8. Virginia.

Also in 1995, Virginia enacted law providing a voluntary environmental assessment privilege and immunity from administrative and civil penalties for voluntarily

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<sup>362</sup> See UTAH CODE ANN. § 19-7-109(3).

disclosed violations.<sup>363</sup> Subsection 1193(A) defines the key terms of “environmental assessment”<sup>364</sup> and “document”.<sup>365</sup> In a slight variation, the definition of “document” contains the Prior Information and Endangerment exclusions, which appear in separate provisions of the other state audit laws. This law does not require the document, ie. audit report, to be labeled.

Subsection 1193(B) prohibits compelling any person involved in the preparation of or in possession of a document to disclose the document or information relating to its contents, or even the details of its preparation. Under this subsection, “[s]uch a document, a portion of a document or information is not admissible without the written consent of the owner or operator in an administrative or judicial proceeding and need not be produced as a result of an information request of the Department or other agency of the Commonwealth or political subdivision.”<sup>366</sup>

Restricting the application of the privilege, subsection 1193(B) also provides that it does not cover a “document, portion of a document or information” that indicates a clear, imminent and substantial danger to the public health or the environment - a

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<sup>363</sup> See VA. CODE ANN. §§ 10.1-1198, -1199 (Michie 1995) (enacted by H.B. 1845, 1994-95 Reg. Sess., on Mar. 24, 1995).

<sup>364</sup> See VA. CODE ANN. § 10.1-1198.A (defined to mean “a voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention. An environmental assessment may be conducted by the owner or operator of a facility or an independent contractor at the request of the owner or operator.”).

<sup>365</sup> See VA. CODE ANN. § 10.1-1198.A (defined to mean “information collected, generated or developed in the course of, or resulting from, an environmental assessment, including but not limited to field notes, records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys. ‘Document’ does not mean information generated or developed before the commencement of a voluntary environmental assessment showing noncompliance with environmental laws or regulations or demonstrating a clear, imminent and substantial danger to the public health or environment.”).

<sup>366</sup> See VA. CODE ANN. § 10.1-1198.B

situation seemingly already addressed in the definitions subsection. In addition, this subsection provides that the privilege does not extend to a document or portion of a document required by law or prepared independently of the assessment process. The Virginia law specifies, as another exception to the privilege, that it does not shelter a document collected, generated or developed in bad faith. This subsection also includes the No Interference provision of the Oregon law.

Almost identical to the Colorado act, subsection 1198(C) places the *prima facie* burden on the party asserting the privilege and the burden of proving an exception on the party seeking disclosure. This subsection also matches the Colorado provision for a hearing officer or a court to conduct an *in camera* review of the relevant portions of a document or information to determine the applicability of an exception, provided any party establishes that probable cause exists, based on independent knowledge, to believe a listed exception applies to all or a portion of a document or information. Differing slightly, this subsection allows the party to make the requisite showing to an informal fact-finding proceeding held pursuant to section 9-6.14:11, a formal hearing pursuant to section 9-6.14:12, or a judicial proceeding. This subsection also provides that the court or hearing examiner may have access to the relevant portions of a document subject to conditions necessary to ensure confidentiality.

As does the Colorado law, subsection 1198(C) also prohibits a moving party, who obtains access to the document or information, from divulging any information from the document or other information, except as the court or hearing examiner specifically authorizes. Virginia did not follow the Colorado act by imposing liability for violating this subsection.

Virginia qualified its immunity provision in subsection 1199 by adding the provision that any action under that subsection must be consistent with the requirements imposed by federal law. The subsection then specifies that any person who voluntarily discloses information to a state or local regulatory agency relating to a violation of an environmental statute, regulation, permit, or administrative order shall have immunity from administrative or civil penalty under such, statute, regulation, permit, or administrative order. Thus, the immunity protection is not as broad as that granted by Texas or, even, Colorado, since it does not extend to any criminal violations.

Subsection 1199 provides that to be voluntary the disclosure must satisfy the following conditions:

1. Not Required - it is not otherwise required by law, regulation, permit, or administrative order;
2. Prompt - it is made promptly after learning of the violation through the voluntary assessment;
3. Satisfactory Correction - the person making the disclosure corrects the violation in a diligent manner pursuant to a compliance schedule submitted to the appropriate state or local regulatory agencies indicating such diligence.<sup>367</sup>

Although this subsection does not provide for the regulatory agency approval of the compliance schedule, as does Minnesota, it does require correction of the noncompliance and not just the initiation of appropriate remedies.

As another restriction on the grant of immunity, subsection 1199 specifies that a person found to have acted in bad faith when making the voluntary disclosure will not receive the protection. While this provision may not be broad enough to exclude persons with previous violations in the recent past, it seems to cover the Fraud exception.

Subsection 1199 also provides that the act does not bar a civil action against an owner or operator to recover damages for injury to person or property.

## 9. Wyoming.

Wyoming also joined the audit law movement in 1995 by adopting an environmental audit privilege statute which, in addition, grants immunity from civil penalties for voluntarily reported violations.<sup>368</sup> Subsection 1105(a)(i) defines “environmental audit” to have the same meaning as the Oregon law, except it adds that the audit must be completed within 180 days and that the act does not authorize uninterrupted environmental audits. Under subsection 1105(a)(ii), an “environmental audit report” means the same thing as provided in the Oregon act, with the exception that it must incorporate the three specified components the Oregon law allows the report to contain.

Subsection 1105(b) creates a privilege to protect the confidentiality of voluntary environmental audits of compliance programs and management systems. Under subsection 1105(c), the audit report is privileged and not admissible in civil, criminal, or administrative proceedings. The privilege does not apply under subsection 1105(c)(i) if the owner or operator waives the privilege in whole or in part. Seeking to introduce any part of a report as evidence in any proceeding, including reporting a violation under the immunity provision of the act, waives the privilege only with respect to the portions of the report sought to be introduced.

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<sup>367</sup> See VA. CODE ANN. § 10.1-1199.

<sup>368</sup> See WYO. STAT. §§ 35-11-1105, -1106 (1977)(enacted by S.B. 96, 53rd Leg. 1st Sess. (1995) on Mar. 24, 1995).

Differing from the Oregon act which mandates disclosure, subsection 1105(c)(ii) excepts from the privilege all or part of the report that a court or hearing officer may require to be disclosed in a civil or administrative proceeding after conducting an in camera review. The discretionary grounds for requiring disclosure include the Fraud exception, Unqualified exception, and Unsatisfactory Corrective Action exception outlined in the Oregon statute. Wyoming added in this subsection, as another basis for requiring disclosure, a determination that the report contains information demonstrating "a substantial threat to the public health or environment or damage to real property or tangible personal property in areas outside of the facility property."<sup>369</sup>

In a criminal proceeding, subsection 1105(c)(iii) permits but does not direct the court to require disclosure of all or a part of the report if it determines, after an in camera review outlined in paragraphs (c)(v) through (ix), that any of the exceptions described above apply. Slightly less stringent than the Necessary Circumstances provision of the Oregon act, this subsection specifies that the court may require disclosure if the report contains evidence relevant to the commission of a criminal offense under state or federal environmental law, the prosecutor has a need for the information, which is not otherwise available, and the prosecutor cannot obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay. Thus, the prosecutor need not establish a compelling need for the information.

Subsection 1105(c)(iv) allocates the burden of proof in a manner identical to the Oregon law. Likewise, subsection 1105(c)(v) provides the same Probable Cause authority to the prosecutor. Subsection 1105(c)(vi) varies from the Oregon procedure by

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<sup>369</sup> See WYO. STAT. § 35-11-1105(c)(ii)(D).

granting only twenty days for the owner or operator to file the petition requesting review or to waive the privilege if it does not. Under subsection 1105(c)(vii), the court has only 30 days to issue the Scheduling and Protective orders described in the Oregon law. This subsection contains the same Limited Access and Restrictive Use provisions that apply to prosecutors preparing for the hearing. Also in accordance with the Oregon statute, subsection 1105(c)(viii) includes the Stipulation provision and subsection 1105(c)(ix) permits only Relevant Disclosure orders.

Wyoming chose to follow the Colorado act in subsection 1105(d), which identifies the automatic exclusions from the privilege. This subsection specifies that the privilege does not extend to Required Information, Agency Obtained Information, Independent Information, Prior Information, or Subsequent and Independent Information. In subsection 1105(e), Wyoming adopted the No Interference provision of the Oregon law.

Subsection 1106(a) contains the immunity provision, which prevents the regulatory department from seeking civil penalties or injunctive relief for a violation voluntarily reported to the department by an owner or operator of a regulated facility within 60 days of the completion date of the audit. Similar to the Kentucky, Utah, and Virginia laws in that it applies only to civil penalties, this subsection differs by precluding injunctive relief. The immunity protection does not provide shelter in the following circumstances:

1. Under Investigation - the facility is under investigation at the time the violation is reported for violating state environmental law;

2. Unsatisfactory Correction - the owner or operator fails to take action to eliminate the violation within the time frame specified in an order affirmed by the council or otherwise made final pursuant to W.S. 35-11-701(c)(ii);
3. Reckless - the violation results from gross negligence or recklessness; or
4. Delegation Requires - the department has assumed primacy over a federally delegated environmental law and a waiver of penalty authority would result in a less stringent state program or the waiver violates any federal rule or regulation required to maintain state primacy. If a federally delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall, to the extent permitted under federal law or regulation, mitigate the amount of the penalty.<sup>370</sup>

Under subsection 1106(b), reporting a violation does not qualify for immunity protection if federal, state, or local environmental law requires the report or if it is mandatory under any order of the council or any court. Subsection 1106(c) permits seeking injunctive relief under W.S. 35-11-115, notwithstanding subsection 1106(a).

Following the Colorado law exactly, subsection 1106(d) makes the immunity provision inapplicable to owners or operators with a pattern of continuous or repeated violations, including a pattern demonstrated by multiple settlement agreements. The legislation enacting the audit law contains a provision similar to the Minnesota statute in that it requires the regulatory agency to prepare an annual report to the joint minerals, business and economic development interim committee as to the effectiveness of the act and whether the process adopted meets the findings and purposes of the act.<sup>371</sup> Although it does not contain a sunset provision, the act obliges the committee to report its findings and recommendation to the legislature during the 1998 budget session and every two years thereafter.

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<sup>370</sup> See WYO. STAT. § 35-11-1106(a).

<sup>371</sup> See 1995 Wyo. Sess. Laws ch. 58, § 5.

## 10. Michigan.

On March 15, 1996, Michigan adopted its audit law that borrows different provisions from other states' laws and adds a few unique twists of its own in granting both privilege and immunity protections.<sup>372</sup> Section 14801 defines the key terms "environmental audit"<sup>373</sup> and "environmental audit report".<sup>374</sup> These definitions vary from the Oregon law by expanding the purposes for an audit and mandating the inclusion of supporting information in the report.

Under subsection 14802(1), facility owners or operators, or their employees or agents, may conduct an environmental audit and create an environmental audit report at any time. Subsection 14802(2) makes such a report privileged and protected from disclosure. Embellishing the automatic exclusions of the Oregon statute, subsection 14802(3) withholds the protection from any of the following materials regardless of whether the reports includes them:

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<sup>372</sup> See 1996 Mich. Leg. Serv. P.A. 132 (S.B. 728)(West)(to be codified at MICH. COMP. LAWS ANN. §§ 324.14801 to -14810)(enacted Mar. 15, 1996).

<sup>373</sup> See MICH. COMP. LAWS ANN. § 324.14801(a) (defined to mean "a voluntary and internal evaluation conducted on or after the effective date of this part of 1 or more facilities or an activity at 1 or more facilities regulated under state, federal, regional, or local laws or ordinances, or of environmental management systems or processes related to the facilities or activity or of a previously corrected specific instance of noncompliance, that is designed to identify historical or current noncompliance and prevent noncompliance or improve compliance with 1 or more of these laws, or to identify an environmental hazard, contamination, or other adverse environmental condition, or to improve an environmental management system or process.").

<sup>374</sup> See MICH. COMP. LAWS ANN. § 324.14801(b) (defined to mean "a document or a set of documents, each labeled at the time it is created 'environmental audit report: privileged document' and created as a result of an environmental audit. An environmental audit report *shall* include supporting information. Supporting information may include field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, follow-up reports, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys, if the supporting information or documents are created or prepared for the primary purpose and in the course of or as a result of an environmental audit. An environmental audit report may also include an implementation plan that addresses correcting past noncompliance, improving current compliance, improving an environmental management system, and preventing future noncompliance, as appropriate.") (emphasis mine).

1. Required Information - documents, communication, data, reports, or other information that a statute, rule, ordinance, permit, order, consent agreement, or other law requires to be made available or reported to a regulatory agency or any other person;
2. Agency Obtained Information - information obtained by observation, sampling, or monitoring by any regulatory agency;
3. Pretreatment Results - pretreatment monitoring results which a publicly owned treatment works or control authority requires an industrial user to report to it, including, but not limited to, results establishing a violation of the industrial user's discharge permit or applicable local ordinance;
4. Independent Information - information legally obtained from a source independent of the audit or from a person who did not obtain the information from the report; or
5. Maintenance Records - machinery and equipment records.<sup>375</sup>

The Pretreatment Results and Maintenance Records exclusions are unique among the state laws.

Subsection 1402(4) follows the Colorado, Kansas, and Texas approach, to a certain extent, by prohibiting compelled testimony from a person conducting an audit and the person to whom the audit results were disclosed. This subsection limits the protection to testimony regarding any information obtained solely through the audit that is part of a privileged portion of the report. Subject to the specified exclusions, the privileged portions of a report are not subject to discovery and are not admissible as evidence in any civil, criminal, or administrative proceeding.

Under subsection 1403(1), the person for whom the report was prepared may expressly waive the privilege and may restrict the waiver to specific portions of the report. Adopting a selective waiver provision similar to the Kansas act, but not as

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<sup>375</sup> See MICH. COMP. LAWS ANN. § 324.14802(3).

detailed as the Texas law, subsection 14803(2) provides that the person for whom the report was prepared or that person's employee or agent does not waive the privilege by disclosing the report or information generated during the audit to an employee or legal representative of the person or an agent of the person retained to address matters raised by the audit. Nor does disclosure under the following circumstances waive the privilege:

1. Confidential Business - a disclosure made under the terms of a confidentiality agreement between the person for whom the report was prepared and a partner or potential partner, or a transferee or potential transferee of, or a lender or potential lender for, or a trustee of, the business or facility audited, or a disclosure made between a subsidiary and a parent corporation or between members of a partnership, joint venture, or other similarly related entities; or
2. Government - a disclosure made under the terms of a confidentiality agreement between governmental officials and the person for whom the report was prepared.<sup>376</sup>

Michigan created a unique process, vaguely resembling the Indiana law, for law enforcement officials to obtain an audit report. Under subsection 14804(1), state or local law enforcement authorities must make a written request delivered by certified mail or a demand by lawful subpoena for disclosure of an audit report. Claiming the privilege accorded by this law, a person may make a written objection to the disclosure within thirty business days after receiving the request or subpoena. A law enforcement official, upon receipt of the objection, may file with the circuit court, and serve upon the person, a petition requesting an in camera hearing to determine whether the report or portions of it are privileged or subject to disclosure. This subsection requires the motion to be made in camera and under seal. The person who could assert the privilege waives it by not making an objection.

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<sup>376</sup> See MICH. COMP. LAWS ANN. § 324.14803(3).

Subsection 14804(2) requires the person asserting the privilege, once the petition is filed, to provide the court a copy of the report and, during the in camera hearing, to provide information relating to the year the audit report was prepared, the identity of the person conducting the audit, the name of the audited facility or facilities, and a brief description of the portion(s) of the report for which privilege is claimed. Upon the filing of such a petition, the court must, pursuant to subsection 14804(3), issue a Scheduling order under seal similar to the Oregon law. Both counsel for the law enforcement agency and the person asserting the privilege shall participate in the in camera hearing, but shall not disclose the contents of the report except under court order.

Under subsection 14804(4), after in camera review, the court must require disclosure of material asserted to be privileged, if it determines either of the following conditions exist:

1. Fraud - the privilege is asserted for a fraudulent purpose; or
2. Unsatisfactory Correction - the material shows evidence of noncompliance, even if subject to the privilege, and the owner or operator failed to take corrective action or eliminate any violation of law identified during the audit within a reasonable time, but not exceeding three years after discovering the noncompliance or violation, unless a longer period of time is set forth in a compliance schedule in an order issued by the regulatory department, after notice in the department's calendar, and following the department's determination that acceptable progress is being made.<sup>377</sup>

The Unqualified exception of the Oregon law does not appear in this subsection which mandates disclosure, but subsection 14804(5) includes it as a basis upon which the court may require the disclosure of material asserted to be privileged.

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<sup>377</sup> See MICH. COMP. LAWS ANN. § 324.14804(4).

In another unique provision covering an application for leave to appeal a finding that the material is not privileged, subsection 14804(6) allows the court to specifically determine whether all or a portion of the material asserted to be privileged, as well as the motions and pleadings, shall be kept under seal during the pendency of the appeal. Otherwise, this subsection requires the disclosure of such information.

Subsection 14805(1) also pertains to law enforcement authorities obtaining an audit report; however, this provision covers seizure of the report pursuant to a search warrant under circumstances authorized by the code of criminal procedure, specifically sections 760.1 to 760.21 of the Michigan Compiled Laws. Under this subsection, law enforcement authorities, upon seizure of the report, must immediately place it under seal and file it with the court authorizing the search warrant. This subsection requires the authorities or the court to notify any person eligible to assert the privilege of the filing. Only if the court orders disclosure under section 14804 or the privilege is waived under section 14803 can the law enforcement authorities inspect, review, or disclose the contents of the report. The remainder of section 14805 specifies the exact same procedure as provided in subsections 14804(2) through (6).

Under subsection 14806(1), a person asserting the privilege bears the burden of proving a *prima facie* case for establishing entitlement to the privilege. Judged by a preponderance of the evidence similar to the Kansas act, a person seeking disclosure of the report must prove that the privilege does not exist under the act. Subsection 14806(2) adopts the Stipulation provision of the Oregon act. Also consistent with the Oregon law, subsection 14806(3) authorizes the court to order Relevant Disclosure.

In another provision peculiar to the Michigan act, section 14807 specifies that a person who uses the act to commit fraud is guilty of a misdemeanor punishable by a fine of not more than \$25,000.00. Section 14808 employs the No Interference provision found in the Oregon statute.

Following the Colorado approach, subsection 14809(1) grants immunity from administrative or civil penalties and fines and from criminal penalties and fines for negligent acts or omissions under Michigan environmental laws and rules, provided the person voluntarily discloses the violations to the appropriate regulatory agency. This subsection clarifies that it does not extend immunity from criminal penalties and fines for gross negligence. In addition, this subsection requires the person making the voluntary disclosure to provide information supporting the claim at the time of making the disclosure to the agency.

To qualify as voluntary under subsection 14809(1), the following conditions must be satisfied:

1. Prompt - the disclosure is made promptly after the person learns of the information disclosed;
2. Satisfactory Correction - the person initiates an appropriate and good faith effort to achieve compliance, pursues compliance with due diligence, and promptly corrects the noncompliance or condition after discovering the violation. Submitting a complete permit application within a reasonable time constitutes appropriate and good faith efforts to correct noncompliance due to failure to obtain a permit;
3. Derivative - the disclosure of information arises out of an environmental audit;
4. Before Investigation - the person conducts the audit prior to learning that a regulatory agency is investigating potential violations;<sup>378</sup>

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<sup>378</sup> See MICH. COMP. LAWS ANN. § 324.14809(1).

This subsection does not impose the two year time limit or the Cooperation condition specified in the Colorado act although it does include the Permit Correction provision.

As with the Colorado law, subsection 14809(2) creates a rebuttable presumption that disclosure under the act is voluntary. Rebutting the presumption requires an adequate showing to the administrative hearing officer or appropriate trier of fact that the disclosure does not qualify under the conditions set forth above. This subsection imposes the burden of rebutting the presumption on the regulatory agency, as does the Colorado statute. Slightly different from the Colorado law, this subsection specifies that only a determination that disclosure is not voluntary shall be considered final agency action subject to judicial review.

Under subsection 14809(3), unless a final determination is made that the disclosure was not voluntary, a notice of violation or cease and desist order shall not include any administrative or civil penalty or fine or any criminal penalty or fine for negligent acts or omissions against the person making the disclosure. Subsection 14809(4) removes the shelter of immunity from a person found by a court or administrative law judge to have knowingly committed a criminal act. In this subsection, Michigan adopted the exact same exclusion from immunity as Colorado did for a Pattern of Violations, including that demonstrated by Multiple Settlement Agreements. However, this subsection differs by requiring the court or administrative law judge to base the decision on the compliance history of the specific facility at issue.

In the same vein as the laws in Kansas, Minnesota, and Utah, subsection 14809(5) provides that where a good faith effort was made to disclose and correct a violation discovered in a voluntary audit, but the person fails to meet all of the conditions for

voluntary disclosure, the regulatory and law enforcement authorities shall consider the nature and extent of any good faith efforts in determining the appropriate enforcement action and must mitigate any civil penalties if one or more of the conditions for voluntary disclosure is established. Subsection 14809(6) specifies that any immunity provided does not eliminate a person's responsibilities under applicable law to correct the violation, conduct necessary remediation, or pay damages. Under section 14809a, nothing in the act, except for the immunity provided in section 14809, limits or affects the authority in any other part of the act or in any other provision of law.

As a unique provision, subsection 14810(1) directs the regulatory department to establish and maintain a data base of voluntary disclosures made under the act. It also specifies that the database must include the number of voluntary disclosures made annually and summarize under general categories the types of violations and the time needed to achieve compliance. Furthermore, the department is obligated to publish a report containing the information in the database annually.

Somewhat similar to the Minnesota and Wyoming acts, subsection 14810(2) provides that, within five years of the act becoming effective, the regulatory department must prepare and submit to the appropriate standing committees of the legislature a report evaluating the effectiveness of the act and specifically describing whether it has been effective in encouraging the use of environmental audits and in identifying and correcting environmental problems and conditions. These last two provisions relate directly to the point of this thesis.

## 11. New Hampshire.

New Hampshire also passed environmental audit legislation in 1996. Offering both protections of privilege and immunity, the law became effective July 1st.<sup>379</sup> Subsection 147-E:1 provides key definitions for "auditor",<sup>380</sup> "environmental audit",<sup>381</sup> "environmental audit report",<sup>382</sup> and "person".<sup>383</sup> Two distinguishing features of these definitions are the requirement to include the preparation date in the report and the apparent exclusion of federal governmental entities from the protections accorded.

In contrast with the Oregon act, but generally similar to the Kentucky law, subsection 147-E:2 requires the audit report to have the following components:

1. Audit Plan - a written plan prepared by or on behalf of the regulated entity before commencing the audit which identifies the proposed auditor, and with specificity the scope of the audit, the anticipated date for initiating the audit, and the anticipated completion date of the audit, which may not under any circumstances be more than six months from the date of commencement;
2. Audit Results - documents prepared by the auditor which must include the information or a summary of the information generated during, or as a result of, the audit and the conclusions and recommendations made during or as a result of the audit, along with all exhibits and appendices. If generated or developed in the course of and by reason of an audit, the documents may include supporting information such as, field notes and records of

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<sup>379</sup> See 1996 N.H. LAWS Ch. 4 (H.B. 275)(to be codified at N.H. REV. STAT. ANN. § 147-E:1 to - E:9)(enacted Mar. 18, 1996)

<sup>380</sup> See N.H. REV. STAT. ANN. § 147-E:1, I (defined to mean "the person or persons engaged or designated by the regulated entity to conduct an environmental audit and may include officers or employees of the regulated entity or independent contractors hired for that purpose.).

<sup>381</sup> See N.H. REV. STAT. ANN. § 147-E:1, IV (defined to mean "a voluntary, objective, and comprehensive evaluation of one or more facilities, activities, or management systems related to such facilities or activities that is undertaken specifically to identify areas of noncompliance and to improve compliance with one or more environmental laws.).

<sup>382</sup> See N.H. REV. STAT. ANN. § 147-E:1, V (defined to mean "a certain set of documents, each labeled 'environmental audit report: privileged document' and bearing the date of preparation, prepared in connection with an environmental audit.").

<sup>383</sup> See N.H. REV. STAT. ANN. § 147-E:1, VIII (defined to mean "any individual, or any business entity, including a trust, firm, joint stock company, corporation (including a government corporation), partnership, association, or any political subdivision of the state.").

observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys;

3. Analysis - documents prepared by the regulated entity analyzing portions or all of the audit documents and discussing implementation matters; and
4. Implementation Plan - documents prepared by the auditor constituting an implementation plan. The plan must identify areas of noncompliance with environmental law, including conditions which may impose a duty to report under environmental law; provided, however, that identification of noncompliance shall not be construed as evidence of noncompliance, as an admission of liability, or as a legal opinion. In addition, the plan must include recommended actions to correct such areas of noncompliance and recommendations for preventing recurrence of the identified noncompliance.<sup>384</sup>

Under subsection E:3, an audit report, prepared pursuant to the act and after its effective date, shall be privileged and not discoverable or admissible as evidence in any civil, criminal, or administrative proceeding, except as specified in the act. This subsection permits the regulated entity or its agents to claim the privilege. Although an auditor who is not an officer, employee, or agent of the regulated entity has authority to assert the privilege, the auditor may not, under any circumstances, waive the privilege.

As in the Oregon statute, subsection E:4, I(a) recognizes an exception to the privilege if the regulated entity waives it either expressly or implicitly. Unique to the New Hampshire law, inadvertent disclosure does not defeat a claim of privilege. Subsection E:4, I(b), similar to the Kentucky act, specifies that by seeking to introduce all or a part of the report the regulated entity waives the privilege for the entire report.

The privilege also does not apply, under subsection E:4, II, when the report indicates noncompliance and appropriate efforts to achieve compliance are not promptly

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<sup>384</sup> See N.H. REV. STAT. ANN. § 147-E:1.

initiated and diligently pursued after discovery. In consonance with the statutes of Colorado, Kentucky, and Utah, subsection E:4, III excepts from the privilege reports revealing a threat of imminent and substantial harm to public health or the environment.

Under subsection E:4, IV(a), in a civil, criminal, or administrative proceeding, the privilege does not apply if the appropriate court, after an in camera review, determines:

1. Fraud - the audit was undertaken for a fraudulent purpose, including without limitation the use of the privilege to avoid disclosing to regulators violations known by the regulated entity to exist or reasonably believed to exist; or
2. After Investigation - the regulated entity commenced the audit after learning of or receiving official notice of an impending government inspection or investigation.<sup>385</sup>

This subsection, in contrast with the other audit laws, explains what the statute means in reference to “fraudulent purpose”.

Somewhat similar to the Oregon act, subsection E:4, IV(b) specifies that a court, in a criminal proceeding only, may find material excepted from the privilege if it shows evidence of a criminal offense and the prosecutor establishes a compelling need for the information which is otherwise not available. This version of the Necessary Circumstances provision does not address delay or expense in obtaining substantially equivalent evidence.

Subsection E:5 identifies the following materials as automatically excluded from the privilege:

1. Required Information - documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available to a regulatory agency under environmental law;

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<sup>385</sup> See N.H. REV. STAT. ANN. § 147-E:4, IV(a).

2. Agency Obtained Information - data or other information obtained by a regulatory agency, including, but not limited to, that gained through observation, sampling, or monitoring;
3. Course of Business - documents, communications, data, reports, or other information developed or maintained in the course of any regularly conducted business activity or regular practice other than in the audit report, even if the auditor reviewed such information, the information formed a basis in whole or in part for the report, or the report incorporated the information; and
4. Audit's Existence - the fact that an environmental audit has been or is being conducted or that an audit report has been or is being prepared.<sup>386</sup>

The Course of Business and Audit's Existence exclusions match provisions in the Colorado law.

If a dispute arises in any civil or criminal proceeding as to whether an audit report is either privileged, subject to an exception, or excluded from the privilege, subsection E:6, I authorizes any party to file with the court a motion requesting an in camera hearing to determine the applicability of the privilege. In the event of such a dispute in any state administrative proceeding, subsection E:6, II allows any party to file with a specific court a petition requesting the same determination. These approaches vary from the other audit laws which place the burden of moving or petitioning the court on one party or the other. Under these subsections the motion or petition must state the basis on which the moving or petitioning party claims the privilege applies or disclosure is required.

Subsection E:6, III specifies that the opposing party shall have ten days to file an objection to such motion or response to such petition. Upon receiving the objection or response, the court must schedule an in camera hearing to be held within twenty-one days of the filing of the motion or petition. This subsection also directs the court to order that

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<sup>386</sup> See N.H. REV. STAT. ANN. § 147-E:5.

a copy of the audit report be immediately provided to the state department of justice. To prepare for the hearing the department of justice may consult with the regulatory department as necessary, but must restrict the review and distribution of the report to protect against further disclosure. As with the Oregon law, the information gleaned from the report in preparation for the hearing cannot be used in any investigation or in any proceeding against the regulated entity and must be kept confidential, unless and until the court finds the report subject to disclosure. Maintaining the shorter procedural time periods of this act compared to the other laws, this subsection requires the court to issue an order deciding the applicability of the privilege within seven days of the hearing.

Under subsection E:7, I the act shall not be construed to relieve any person from complying with any environmental law or the obligation to submit required reports or information, a common provision in many audit laws. To comply with such requirements, a regulated entity may submit information contained in a report. This subsection specifies that such a submission waives the privilege only to the information submitted, not to any other portion of the report. Subsection E:7, II adopts the No Interference provision of the Oregon act, while subsection E:7, III follows the Colorado approach of excluding from the privilege continuous or uninterrupted environmental audits. Somewhat similar to the Colorado and Texas acts, subsection E:8 provides that the auditor shall not be required to testify or otherwise compelled to reveal privileged information, subject to the exceptions and exclusions of the act.

Subsection E:9, I grants immunity from any penalty action<sup>387</sup> for any regulated entity discovering a violation through an environmental audit and electing to undertake the following steps:

1. Within 30 days of discovering the violation, report to the regulatory department:
  - a. The nature and extent of the violation;
  - b. That an environmental audit detected the violation;
  - c. That all violations detected by this environmental audit have been or will be disclosed to the department in accordance with this section;
  - d. The nature and extent of corrective and remedial actions proposed or already undertaken;
  - e. A commitment to take all necessary and appropriate corrective and remedial actions as soon as practicable and in any event within 90 days or, if unable to take such actions within 90 days, in accordance with an agreement negotiated with the department providing for a longer schedule; and
  - f. A commitment to undertake measures to prevent a recurrence of the violation; and
2. Within ten days of completing all corrective and remedial action, report to the department:
  - a. That all necessary and appropriate corrective and remedial actions were completed as soon as practicable, and in any event within the 90 day period or as required by the agreement with the department; and
  - b. The nature and extent of preventative measures undertaken, and that such measures constitute all measures believed to be necessary and appropriate to prevent a recurrence; and
3. The regulated entity must submit adequate information allowing the department to confirm that corrective and remedial actions, as well as preventative measures, are appropriate and were implemented in accordance with state environmental law.<sup>388</sup>

Expanding on the exceptions specified in the Colorado law, subsection E:9, II lists the following factors that disqualify a regulated entity from the penalty waiver provision:

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<sup>387</sup> See N.H. REV. STAT. ANN. § 147-E:1, VII (defined to mean “any administrative, civil, or criminal action initiated by or on behalf of the department and intended to impose a monetary penalty or incarceration for violation of any environmental law.”).

<sup>388</sup> See N.H. REV. STAT. ANN. § 147-E:9(a) to (c).

1. Criminal Action - the violation was a criminal act committed knowingly, purposefully, or recklessly;
2. Harm - the violation caused serious harm to human health or the environment;
3. Recent Violation - within the three years preceding detection of the violation, the regulated entity was the subject of:
  - a. A compliance action<sup>389</sup> or penalty action for violating the same environmental law;
  - b. Multiple compliance actions or penalty actions for violating any environmental laws; or
  - c. Any criminal conviction for violating any environmental law;
4. Agency Action - a federal, state, or local agency action, including an inspection, investigation, or environmental information request, commenced before the violation was disclosed;
5. False Information - any reports or notices required by the act prove not to be true; or
6. Unsatisfactory Corrective or Preventive Action - absent good cause shown:
  - a. Corrective and remedial actions were inappropriate or not implemented in accordance with state environmental law; or
  - b. Measures to prevent recurrence were inadequate or not implemented in accordance with state environmental law.<sup>390</sup>

Consistent with the Colorado law, subsection E:9, III provides that nothing in the act shall prevent the state from initiating a compliance action against the regulated entity for any violation disclosed to or discovered by the department.

In the legislation enacting the audit law, New Hampshire adopted a sunset provision, repealing the act effective July 1, 2002.<sup>391</sup> This provision directs the regulatory department, in consultation with the New Hampshire Business and Industry Association

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<sup>389</sup> See N.H. REV. STAT. ANN. § 147-E:1, II (defined to mean "any administrative or civil action initiated by or on behalf of the department which is intended to cause a person to comply with any environmental law, but which does not seek a monetary penalty, such as letters of deficiency, notices of violation, administrative orders, and civil injunction actions.").

<sup>390</sup> See N.H. REV. STAT. ANN. § 147-E:9, II.

<sup>391</sup> See 1996 N.H. LAWS Ch. 4:3 (H.B. 275).

and other environmental interests, to report its evaluation of the effectiveness of the act to the general court no later than November 1, 2001. The effectiveness depends upon a demonstrable showing that it encourages enhanced voluntary compliance with environmental laws, and not in providing opportunities for avoiding compliance. Under this provision, the repeal does not affect the validity of any privilege attaching to an audit completed before June 30, 2002.

## 12. South Carolina.

To encourage voluntary internal environmental audits and improve compliance with environmental law, South Carolina established privilege and penalty protections in legislation enacted June 4, 1996.<sup>392</sup> In subsection 10(B), the act quickly points out that none of its provisions shall be construed to protect individuals, entities, or facilities from criminal investigation and/or prosecution by the appropriate governmental authority. Subsection 10(C) also limits the protection by providing that any privilege granted by the act applies only to oral or written communications related to and made in connection with the self-audit and does not apply to the facts relating to the violation itself. This latter provision distinguishes the South Carolina law from other audit statutes.

Subsection 20(2) defines "environmental audit" similar to the Oregon act. However, it specifically excludes an environmental site assessment of a facility performed solely in anticipation of the purchase, sale, or transfer of the business or facility. Under this subsection, the audit must be a discrete activity beginning on a

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<sup>392</sup> See 1996 S.C. Acts H.B. 3624, 1995-96 Statewide Sess.,(to be codified at S.C. CODE ANN. § 48-57-10 to -110)(enacted Jun. 4, 1996)

specified date and scheduled to end on a date reflective of the auditor's good faith intentions. An "environmental audit report"<sup>393</sup> may include, but is not limited to, the same supporting materials identified in the Oregon law and may consist of the same three components.

Pursuant to subsection 30(A) an audit report or any part of it is privileged and, consequently, not discoverable or inadmissible as evidence in a legal action, except as provided in subsection 40, 50, and 60. This subsection excludes from the privilege:

1. Agency Obtained Information - information obtained through observation by a regulatory agency;
2. Independent Information - information obtained from a source independent of the environmental audit;
3. Required Information - information obtained pursuant to specific permit conditions that require monitoring or sampling records and reports or assessment plans and management plans required to be maintained or submitted to the regulatory department pursuant to an established schedule or pursuant to specific permit conditions, final departmental orders, or environmental laws that require notification of releases to the environment;
4. Unrelated Documents- documents prepared either before the audit begins or after the completion date of the audit report, and in all instances, any documents prepared independent of the audit or the audit report;
5. Circumventing Documents - documents prepared as a result of multiple or continuous self-auditing conducted as a means of intentionally avoiding liability for violations; or
6. False Information - information which is knowingly misrepresented or misstated or which is knowingly omitted or withheld from an audit report, whether or not included in a subsequent audit report.<sup>394</sup>

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<sup>393</sup> See S.C. CODE ANN. § 48-57-20(3) (defined to mean "a document marked or identified as such with a completion date existing either individually or as a compilation prepared in connection with an environmental audit.").

<sup>394</sup> See S.C. CODE ANN. § 48-57-30(A).

The Required Information exclusion appears more narrow than that provided in the Oregon law.

Subsection 30(B) prohibits compelling testimony regarding the audit report or a privileged portion of the report from a person who conducted or participated in the audit or who significantly reviewed the report, provided the privilege applies. Notwithstanding the privilege provided, subsection 30(C) specifies that nothing contained in the act restricts a party in a state worker's compensation proceeding from obtaining or discovering any evidence necessary and appropriate for proving any issue arising in the case. This provision, which is unique among the state audit laws, further limits the privilege in such cases by providing that it does not prevent the admission of otherwise relevant evidence, even if it is privileged under the act. To preclude disclosure of the privileged information outside of the worker's compensation proceeding, this subsection authorizes the commission to issue appropriate protective orders, upon motion made by a party to the proceeding.

Peculiar to the South Carolina statute, subsection 30(D) provides that, in a criminal proceeding, any information not otherwise available must be made available to prosecutors upon request, but shall not be disclosed to the regulatory department, third parties, or their attorneys, if the privilege otherwise applies. Furthermore, such disclosure does not waive the party's right to assert the privilege under subsection 60. This subsection also specifies that, even if disclosed during a criminal proceeding, the privilege continues to apply and is not waived in civil and administrative proceedings, and the information shall not be discoverable or admissible in civil or administrative proceedings. Although this subsection does not include the specific liability or

misdemeanor provisions of the Colorado and Texas acts, it does specify that the a prosecutor or member of that office, who divulges or disseminates all or any part of the report for which a court has not revoked the privilege, shall be subject to the remedies available to the aggrieved party under common law including, but not limited to, civil contempt.

Under subsection 40(A), the privilege does not apply to the extent it is waived expressly in writing by the owner or operator of the facility where the audit was conducted and who prepared or caused the report to be prepared. Subsection 40(B) generally follows the Kansas law by allowing disclosure of the report and information generated by the audit without waiving the privilege if the information is disseminated to an employee of the owner or operator or the parent corporation of the audited facility, a legal representative of the owner or operator or parent corporation, or an independent contractor retained by the owner or operator or parent corporation to conduct an audit or to address matters raised by the audit.

Nor does disclosure of a report or information generated by the audit waive the privilege under the following circumstances, which are also similar to the Kansas provision:

1. Purchase - disclosure pursuant to a confidentiality agreement between the owner or operator of the facility and a potential purchaser of the business or facility audited;
2. Government - disclosure pursuant to a confidentiality agreement between governmental officials and the owner or operator of the facility; or

3. Business - disclosure pursuant to a confidentiality agreement with a customer, lending institution, or insurance company with an existing or proposed relationship with the facility.<sup>395</sup>

Consistent with the Texas statute, subsection 45 requires the facility coordinating the audit, before it can assert the privilege, to notify the department within ten days of beginning the audit that it is conducting an audit. This subsection also specifies that the notice must contain the commencement date of the audit and the scheduled completion date.

Subsection 50, unlike the other statutes, bifurcates the provision governing review in an administrative and a civil proceeding. In an administrative proceeding before an administrative law judge, the department may move for a declaratory ruling under this subsection on the issue of whether the audit report is privileged. This subsection does not specify that the procedure will be conducted *in camera*, but does provide the administrative law judge with authority to revoke the privilege if the factors outlined in this provision apply. In a civil proceeding, subsection 50 allows but does not require the court, after an *in camera* review, to revoke the privilege if the court determines that disclosure was sought after the effective date of the act and either of the following conditions applies:

1. Fraud - the privilege is asserted for purposes of deception or evasion; or
2. Unsatisfactory Corrective Action - even if subject to the privilege:
  - a. The material shows evidence of significant noncompliance with applicable environmental laws;
  - b. The owner or operator failed to promptly initiate and pursue with diligence appropriate action to achieve compliance or has not made reasonable efforts to complete any necessary permit application; and

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<sup>395</sup> See S.C. CODE ANN. § 48-57-40(C).

- c. As a result, the owner or operator did not or will not achieve compliance with applicable environmental laws or did not or will not complete the necessary application within a reasonable period of time.

As an additional distinctive feature of subsection 50, it incorporates the permit corrective action clause of the immunity provisions found in other laws into the privilege section. It also qualifies the noncompliance element of the Unsatisfactory Corrective Action provision, requiring it to be "significant". Furthermore, this subsection does not identify who has authority to move or petition a civil court to rule on the privileged status.

Subsection 60 provides for the exact same process in a criminal proceeding as that specified in subsection 50 for a civil proceeding with a single exception. Instead of requiring a determination that the material show evidence of "significant" noncompliance, subsection 60(2)(a) calls for a finding that the material indicates "wilful" (sic) noncompliance. The other conditions remain the same.

Similar to the Oregon law, subsection 70 imposes on the party asserting the privilege the burden of establishing that the materials meet the definition of an environmental audit report and also that it has diligently pursued compliance. While the party seeking disclosure bears the burden of proving the conditions for disclosure set forth in subsection 50, the prosecutor must establish the conditions for disclosure which subsection 60 sets forth.

Subsection 80 contains the Stipulation provision found in the Oregon act. Adding a unique provision, this subsection specifies that in the absence of an on-going proceeding, the department may seek a declaratory ruling from the circuit court if the parties cannot agree on whether the materials are privileged. The action may request the

court to decide the privileged status of the materials and whether the privilege should be revoked under subsection 50 or 60. Consistent with the Oregon law, subsection 90 adopts the No Interference provision.

Following the Colorado approach, subsection 100(A) recognizes a rebuttable presumption that a voluntary disclosure by a person or entity of an environmental compliance violation makes the person or entity immune from any administrative or civil penalties associated with the issues disclosed. This subsection varies from the Colorado law by expressly providing the immunity to violations of state laws, or the federal, regional, or local counterpart or extension of these laws. Like many of the other states, Colorado limits the definition of the applicable environmental laws to those of the state. This subsection echoes an earlier provision by specifying that nothing in the act shall be construed to provide immunity from criminal penalties, which also differs from Colorado's protection from penalties for criminally negligent violations.

To be considered voluntary, the disclosure must satisfy the following conditions under subsection 100(B):

1. Timely Disclosure - the disclosure is made within fourteen days following a reasonable investigation;
2. Appropriate Agency - the disclosure is made to an agency with regulatory authority over the violation disclosed;
3. Satisfactory Corrective Action - the person or entity initiates action to resolve the violation disclosed in a diligent manner;
4. Cooperation - the person or entity cooperates with the appropriate agency during investigation of the matters identified in the disclosure; and
5. Compliance Pursued - the person or entity diligently pursues compliance.<sup>396</sup>

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<sup>396</sup> See S.C. CODE ANN. § 48-57-100(B).

Although this subsection appears not to require actual correction of the noncompliance, which the other audit immunity laws generally demand, the act addresses the issue in the next subsection.

Under subsection 100(C), a disclosure does not qualify as voluntary and, consequently, the immunity protection does not extend to the following situations:

1. Permit Requirement - when specific permit conditions require monitoring or sampling records and reports or assessment plans and management plans to be maintained or submitted to the regulatory department under an established schedule;
2. Required Notification - if specific permit conditions, final departmental orders, or environmental laws require notification of releases to the environment;
3. *Mens Rea* - the violation was committed intentionally and willfully by the person or entity making the disclosure;
4. Unsatisfactory Correction - the violation was not corrected in a diligent manner;
5. Harm - the violation caused significant environmental harm or a public health threat; or
6. Repeat Violation - the violation occurred within one year of a similar prior violation at the same facility and the department granted immunity from civil and administrative penalties for the prior violation.

In contrast with the Pattern of Violation provision of the Colorado act, this subsection specifies that the previous violation must have received immunity protection before it counts as a “prior violation”. It also reduces the time period from three years to one year, while further limiting the exception to those violations occurring at the same facility.

Subsection 100(D) differs from the Colorado act as well by placing the decision making authority over whether the governmental entity has rebutted the presumption at

the court or administrative law judge level, rather than at the executive commission or state board of health level. Under this subsection, a state or local governmental agency must show to the satisfaction of the court or administrative law judge that the disclosure was not voluntary as described above. If it does not, the governmental agency may not include an administrative or civil penalty or fine in a notice of violation or in a cease and desist order relating to the environmental compliance violation granted immunity under the act.

In contrast to the Mississippi and Texas statutes, subsection 100(E) provides that a voluntary disclosure under the act is subject to disclosure under the South Carolina Freedom of Information Act. Subsection 100(F) adds a unique provision specifying that final waiver of penalties and fines cannot be granted until the department certifies full compliance occurred in a reasonable time. Unless the department makes this certification, the department retains complete discretion to assess penalties based on its Uniform Enforcement Policy.

Similar to the Texas act, subsection 110 prohibits a state or local governmental rule, regulation, guidance, policy, or permit condition from circumventing or limiting the privilege established by the act or the exercise of the privileges or the presumption and immunity granted by the act. Finally, section 3 of the enacting legislation specified that the privilege adopted does not apply to any administrative, civil, or criminal proceedings pending or any violations which were known or discovered by the owner or operator prior to the effective date of the act.

### 13. South Dakota.

Also in 1996, South Dakota passed an environmental audit law granting limited immunity and, somewhat similar to the Idaho statute, prohibiting the state from compelling disclosure of an audit report.<sup>397</sup> The act does not expressly refer to any privilege and omits the exceptions to the prohibition against compelled disclosure contained in the Idaho law.

Section 33 defines an “environmental audit” as “a written, voluntary, internal assessment, evaluation, or review, not required by law, rule, regulation, or permit, that is conducted by a regulated entity or its agent, and initiated by the regulated entity for the purpose of determining compliance with environmental law, rule, regulation, or permit enforced by the department.”<sup>398</sup> Under this section, completing an environmental audit in compliance with the terms and conditions of the act raises a presumption against the imposition of civil and criminal penalties for violation detected and disclosed. Similar to the Colorado act, this section provides that it does not authorize uninterrupted or continuous auditing. Section 33 further specifies that an audit may not be used to prevent the department from performing its statutory or regulatory functions.

According to section 34, the department may not pursue civil penalties or criminal prosecution for violations discovered during an audit, provided the violations are disclosed to the department secretary in writing within thirty days of discovery. This section excepts from the protection of the act any violations found by the department

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<sup>397</sup> See S.D. CODIFIED LAWS ANN. §§ 1-40-33 to -37 (1996)(1996 S.D. Laws S.B. 24)(enacted Mar. 8, 1996)

<sup>398</sup> See S.D. CODIFIED LAWS ANN. § 1-40-33.

before a regulated entity discloses them in writing to the department secretary. In the same vein as the Wyoming law, section 34 also excepts from the act's coverage situations when a state program is required in writing by a federal agency to assess penalties for a violation in order to maintain primacy over a federally-delegated program. As another exception, this section provides that the act does not apply to violations which cause damage to human health or the environment.

In addition, section 34 requires violations to be corrected within sixty days of discovery, if they are detected during an audit and disclosed in writing to the department secretary. If the violation cannot be corrected within sixty days, this section directs the department and the regulated entity to negotiate a written compliance schedule for correcting the violation disclosed, unless the department is satisfied the violation has been resolved by the time it is disclosed.

Section 35 prohibits the department from requesting the results of an environmental audit. However, it does, distinct from the other audit laws, make the audit subject to discovery according to the rules of civil and criminal procedure. Under this section, a regulated entity may summarize a violation for purposes of disclosure to the department secretary, if it chooses to disclose a violation detected during an audit. This summary must include the date the violation was discovered and the identity of the entity conducting the audit. Consistent with the other state audit laws, this section provides that documents, communication, compliance date, reports, or other information required to be collected, developed, maintained, or reported to the department pursuant to state law, rule, regulation, or permit are not protected by the act.

Under section 36, a regulated entity may not use an audit as a defense in civil or criminal action if the following conditions apply:

1. *Mens Rea* - a regulated entity has willfully and with knowledge violated state or federal environmental law, rule, regulation, or permit;
2. Repeat Violation - the entity has established a pattern of repeatedly violating environmental law, rule, regulation, permit, order, or compliance schedule within the two years preceding the date of disclosure;
3. Unsatisfactory Correction - the entity has not corrected the violation within 60 days of discovery or according to the negotiated compliance schedule prescribed by the act; or
4. Prior Penalty - the entity has been issued a notice of violation resulting in the assessment of a civil penalty within the two years preceding the date of disclosure.<sup>399</sup>

The Repeat Violation provision of this section does not expressly require that a court or administrative law judge had found that the entity committed the previous violations, as the Colorado act specifies. Also varying from the Colorado law, this section does not qualify the exclusion by limiting it to violations due to separate and distinct acts.

South Dakota distinguished its audit law further by adding a separate escape provision. Under section 37, the secretary may remove the protections of the act if they are abused. To exercise the removal authority, the secretary must enter a finding that one of the following conditions apply:

1. False Information - a regulated entity has intentionally misrepresented material facts regarding the violations disclosed under the act or the nature or extent of any damage to human health or the environment;
2. Persistent Audit - the entity engaged in multiple or continuous self-auditing to intentionally avoid liability for violations; or

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<sup>399</sup> See S.D. CODIFIED LAWS ANN. § 1-40-36.

3. Imminent Audit - the entity initiated a self-audit to intentionally avoid liability for violations after learning discovery was imminent.<sup>400</sup>

This section mandates that, within 30 days of such a finding being entered, the regulated entity be afforded an opportunity for a contested case hearing on the matter before the secretary, as provided in chapter 1-26. Constituting final agency action, the secretary's final decision may be appealed to the circuit and supreme courts in accordance with chapter 1-26.

## V. Conclusion.

### *A. Summary.*

On the battle field tension mounts between the EPA's "Final Policy" and state environmental audit laws. The conflict becomes increasingly important as the number of states with such statutes climbs dramatically and the deadline for Title V approval nears.

Despite varying definitions, an environmental audit generally allows a regulated entity to examine its operations and management systems to determine its compliance status relative to numerous environmental requirements mandated by federal, state, and local laws. Because the audit detects areas of noncompliance, regulated entities fear that enforcement authorities and third parties may use the results against them. The law offers some protection from this happening if the audit is conducted in a manner which satisfies the requirements of the attorney-client privilege, the work product doctrine, or the self-evaluative privilege. Since these shelters provide only limited refuge and enforcement

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<sup>400</sup> See S.D. CODIFIED LAWS ANN. § 1-40-37.

resources are strained, governmental and regulated entities have sought other methods to encourage voluntary compliance with environmental laws.

In its policy, EPA offers reduced penalties and assurance that it will not refer qualifying regulated entities to the Justice Department for criminal prosecution. This approach retains the restraint EPA self-imposed of not requesting audit reports routinely.

In contrast with the state audit laws, the Final Policy covers self-disclosure of noncompliance that regulated entities are otherwise required to report by environmental laws. It also applies to violations detected through due diligence systems not just those discovered during an environmental audit. Underneath the policy lies the purpose of achieving greater compliance through encouraging companies to self-police their environmental management programs. The Final Policy is just one method of attempting to attain this goal.

Although DOJ supports the Final Policy, the department already has guidelines covering the exercise of prosecutorial discretion in cases with violations voluntarily disclosed by a regulated entity. Similarly, the proposed U.S. Sentencing Guidelines address environmental auditing by considering it as a mitigating factor in determining the amount of penalty to impose. Pending federal legislation takes the form of offering both privilege and immunity protections for regulated entities that perform environmental audits.

Some states have taken a different approach to promote compliance. Since 1993, twenty states have adopted incentives in one form or another that offer entities protection for violations detected through environmental audits. Many statutes make reports of these efforts privileged information, alleviating company fears that audits will be used

against them. In addition to this protection, other states have enacted legislation granting immunity to regulated entities that discover, disclose, and correct violations of environmental laws.

The conditions and exceptions found in the state statutes vary greatly and, to a certain degree, even mirror those contained in the EPA policy. Most of the statutes except from the privilege audits conducted for a fraudulent purpose and do not provide immunity to regulated entities with a pattern of recent violations. The state laws generally provide for *in camera* review of audit reports to determine the applicability of the privilege. Many of the unique provisions of the particular laws are designed to protect the integrity of the audit shelter, thereby, eliminating bad actors from gaining any benefit under the acts.

### ***B. The Conflict.***

EPA opposes privilege and immunity laws because it perceives them to promote secrecy and exclude the public from participating in matters that concern their environment.<sup>401</sup> The agency believes such statutory shields run contrary to the prevailing principles of open decision-making for environmental issues and the community's right to know about matters which may affect it.<sup>402</sup> However, state audit statutes generally do not protect information that regulated entities are otherwise required to report under other environmental laws.<sup>403</sup> In response to the immunity provisions, EPA argues that they

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<sup>401</sup> EPA, *supra* note 12, at 66,706.

<sup>402</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d; Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11002-11050.

<sup>403</sup> See COLO. REV. STAT. § 13-25-126.5(4)(a).

protect criminals and allow violations that threaten or actually cause harm to go unpunished.<sup>404</sup>

In addition, EPA officials have stated that the agency may withhold delegation of environmental enforcement programs from states with audit statutes and may withdraw already delegated programs in such states.<sup>405</sup> The requirements for states to receive delegation are set forth in the CAA,<sup>406</sup> CWA,<sup>407</sup> RCRA,<sup>408</sup> and the regulations implementing these statutes.<sup>409</sup> Several of the states with audit laws already have delegated programs or have requested delegation under the CAA, CWA, and RCRA.

The Office of Enforcement and Compliance Assurance issued a memorandum describing its interpretation of Title V program requirements under the CAA relative to state audit statutes.<sup>410</sup> Limited to the CAA - the agency is still working on its interpretation of the delegation requirements of the CWA and RCRA - the policy focuses on the adequacy of state enforcement authority to recover appropriate civil and criminal penalties, as well as to seek injunctive relief. This policy letter constituted the cornerstone of the attack mounted by EPA in June.

### ***C. The Peaceful Solution: Study.***

The review earlier in this paper of EPA's actions in developing its current policy served to highlight the importance of studying an approach to promoting compliance in

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<sup>404</sup> EPA, *supra* note 12, at 66,712.

<sup>405</sup> EPA, *supra* note 14.

<sup>406</sup> CAA § 502(b), 42 U.S.C. § 7661a(b).

<sup>407</sup> CWA § 402(b), 33 U.S.C. § 1342(b)

<sup>408</sup> RCRA § 3006(b), 42 U.S.C. § 6926(b).

<sup>409</sup> 40 CFR Pt. 70, Pt. 123, & Pt. 271, respectively.

an effort to improve it. The agency forged its initial policy in 1986, then, through a process which spawned many comments and included conducting a survey, it arrived at the Interim Policy. After making significant changes, EPA issued the Final Policy at the end of 1995. In this latest version, the agency announced it would complete a study of the effectiveness of the policy within three years. This study would determine if the policy encouraged changes in compliance behavior, prompt disclosure and correction of violations, improvement of environmental performance, promotion of public disclosure, and consistency among state programs.

Several of the state audit laws adopted a similar approach. Colorado, Idaho, Minnesota, and New Hampshire all included sunset provisions in their statutes. By inserting provisions which repeal the audit laws, these states will force the legislatures to take affirmative action to extend the protections of these statutes if such action is deemed appropriate after the laws have stood the test of time. The audit acts of Michigan, Minnesota, New Hampshire, and Wyoming specifically require the regulatory agency to submit reports to the legislature which assess the effectiveness of the laws in promoting compliance. In Texas, the lieutenant governor directed a senate committee to complete a study of that state's statute before the legislature reconvenes in January 1997.<sup>411</sup>

Taken together the analysis performed by EPA and these states should provide some indication of how well the different approaches work to encourage regulated entities to conduct environmental audits and correct noncompliance. EPA claims that

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<sup>410</sup> *EPA Memorandum On Effect Of Audit Immunity/Privilege Laws On States' Ability To Enforce Title V Requirements*, dated Apr. 5, 1996, Daily Env't Rep. (BNA) Apr. 15, 1996, at E-1.

<sup>411</sup> *State Roundup: Texas*, Daily Env't Rep. (BNA) Sep. 12, 1995 (1995 DEN 176 d22).

seventy-six companies have already availed themselves of the Final Policy.<sup>412</sup> Since the Texas statute was enacted, 239 firms have notified the regulatory commission of their intent to perform audits, and more than thirty-five of these entities have disclosed the results to the commission.<sup>413</sup> One commentator has suggested using as measures of success: the numbers and quality of auditing and "due diligence" programs among the regulated community; the numbers and types of violations detected, corrected, and disclosed; the programmatic improvements and startups agreed to during negotiations, the environmental and human harm remedied; trends in repeat violations and patterns of violations; and identifying any uses of or efforts to obtain audit-related information to investigate or prosecute violations.<sup>414</sup> The Price Waterhouse survey provides a baseline against which the progress of the different approaches may be judged.

So, why should EPA not take additional time to evaluate - to be "informed by fact" - which method best protects public health and the environment? Other than reluctance at the federal agency, the remaining obstacle seems to be the deadlines set by the CAA for approval of state operating permit programs. The CAA itself may provide the resolution.

Section 502(i)(1) of the CAA directs the Administrator to notify a state that she has determined the state permitting authority is not adequately administering and

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<sup>412</sup> *Environmental Audits: 76 Companies Disclosed Violations Under EPA Audit Policy, Official Says*, Nat'l. Env't Daily (BNA) Jul. 30, 1996 (7/30/96 NED d8) (The agency reported 65 disclosures as of 7 days earlier, see EPA, Envtl. News, EPA Announces Enforcement Accomplishments, EPA 96-R-107, 1996 WL 409443 (E.P.A.) (Jul. 23, 1996).

<sup>413</sup> *Id.* (BNA), see also Kurt Fernandez, *Environmental Audits: Violations Disclosed Under Immunity Laws Would Have Eluded Texas, Observers Agree*, Daily Env't Rep. (BNA) Apr. 24, 1996 (1996 DEN 79 d3).

<sup>414</sup> James T. Banks, *EPA's New Enforcement Policy: At Last, A Reliable Roadmap To Civil Penalty Mitigation For Self-Disclosed Violations*, 26 Envtl. L. Rep. 10227 (May, 1996).

enforcing the Title V program, or a portion thereof.<sup>415</sup> This same subsection authorizes the Administrator to apply CAA sanctions in this instance. If within eighteen months after such notice, the Administrator makes a similar determination, subsection 502(i)(2) requires the Administrator to impose CAA sanctions. These provisions allow EPA to avoid a premature conclusion that the state audit laws necessarily make the state's enforcement authority inadequate. Instead, the agency could study the effects of the audit laws on the implementation of the state operating permit program and make a determination based on fact and not on *a priori* reasoning.

This thesis proposes that EPA grant final approval to otherwise qualified state operating permit programs. When it takes this action, the agency can announce its opposition, if it desires, but still follow the notion of reinventing government by according states the opportunity to experiment with different approaches to protect our environment. EPA could even impose a condition on the delegation that the state agree to engage in an evaluation of the impact of its audit law on enforcement authority and report its findings to the agency. In this manner, EPA could gather the evidence it needs to support a determination under CAA section 502(i), or it would accumulate additional data by which to judge the effectiveness of its Final Policy. One way or the other, this Hegelian dialectic seems preferable to all out war between EPA and the states where the battlefield is our environment.

As an alternative, Congress can resolve the conflict by adopting the audit legislation pending before it, amend the federal environmental statutes to provide more flexibility for the states to carry out their delegated programs, or codify the Final Policy

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<sup>415</sup> CAA 502(i)(1); 42 U.S.C. 7661a(i)(1).

of EPA. The Congress might make an even wiser choice by calling for a truce and mandating - something it does well - that EPA evaluate the various methods of handling environmental audits and report the findings to the national legislature, which can then pass the supreme environmental audit law.

#### *D. Closing.*

Having reviewed the broad scope of environmental auditing under federal and state approaches, this paper identified the conflict occurring right now in our midst. EPA must either cease fire and open up a dialogue for peace with the states or it can rush headlong into the fray. This paper does not advocate the agency retreat because its policy may prove the better approach. After all, the Final Policy accords favorable treatment for violations that environmental laws require to be reported. None of the state statutes, nor the federal bills offer the breadth of this protection.

This thesis argues only for a simple approach. Let reason and experience lead us away from conflict. The audit laws have only been in effect for a short period of time. EPA's Final Policy became effective just this past January. Fortunately, the CAA provides the flexibility needed to stave off this battle. All that is lacking is the will to halt the attack and the strength of courage to let empirical evidence reveal the best approach to protecting our environment.

## Appendix A

### **Extract of Matrix Summary of Public Comments on the Environmental Self-Policing and Self-Disclosure Interim Policy**

<b>Policy Provision</b>	<b>Comment Summary</b>	<b>Number of Comments</b>
1. Required Audits/Disclosures	No penalty mitigation for conducting audits/analyses prescribed by law, permit, or rule.	23
2. Mitigation for Voluntary Self-Policing, Disclosure, and Prompt Correction	a. Minimum of voluntary self-policing, disclosure, and prompt correction for penalty mitigation. b. No penalties for self-policing, disclosure, and prompt correction.	23 32
3. Effect of Compliance History on Mitigation	Clarify that repeat or recurring violations will prevent penalty mitigation	24
4. 75% vs. 100% Mitigation	Support sliding penalty scale (for severity of violation, conditions met, size of business, intensity of audit, etc.)	26
5. Other Penalty Mitigation Schemes	Pollution prevention should be a penalty mitigation factor	28
6. Policy Requirement of Eliminating Gravity Component	Use of mandatory term “will” eliminates all EPA discretion when deciding whether a facility should receive full penalty mitigation; change to “may”.	21
7. Penalty Mitigation as Incentive	Penalty mitigation does not provide adequate incentive for self-auditing and voluntary disclosure.	24
8. Protection from 3 <sup>rd</sup> Party	a. Policy should provide	35

Lawsuits	protection from 3 <sup>rd</sup> party (including citizen) lawsuits and enforcement actions.	
	b. Preclusive effect of EPA actions on private enforcement efforts is governed by statutory and judicial law and the policy should not attempt to define when, or under what circumstances, the policy will affect litigation.	21
9. Privileges and Immunity	a. Rejection of broad privilege and immunity is essential.	84
	b. Privileges and immunities are appropriate if they contain safeguards which assure disclosure and remediation.	15
	c. Audits, audit data, and results should be confidential and subject to audit privilege.	45
10. Treatment of Criminal Conduct under Policy	Policy's provisions dealing with criminal behavior should not be expanded.	21
11. Promulgation of Rule or Legislation	Because EPA policies are non-binding, EPA should consider promulgating rules and regulations that capture principles stated in the auditing policy.	19
12. Application of Policy	a. EPA's freedom to disregard or deviate from its own policy undermines the incentives that the policy offers.	34
	b. Policy contains many disclaimers and limitations which retains EPA discretion in a multitude of circumstances, therefore, negating all certainty.	16
12. Disclosures Covered by	a. Policy should exclude	22

Policy	mandatory reporting (required by statute, regulation, or permit).	
	b. Policy should include (but not be limited to) mandatory reporting.	27
	c. Require disclosure within specified length of time, such as 10 days.	21
13. Extent of Disclosure Required	Require disclosure of entire audit and all violations.	38
14. Certification of Audits	EPA should require certification of audits submitted under policy.	21
15. Inclusion of Compliance or Environmental Management Systems (CMS/EMS) in Definition of Self-Audit	a. Definition of self-audit should include CMS/EMS  b. EPA should provide minimum criteria for or definition of a state-of-the- art CMS that would qualify for policy benefits.	30 23
16. Definition of Self-Audit	a. "Systematic" should mean "a comprehensive review of all manufacturing or other processes which have the potential to create or emit pollution" and performed on a periodic schedule.  b. EPA should calculate a reasonable timetable based on factors (such as the nature and size of a facility) that would outline a periodic (repetitive) auditing schedule.	21 21
17. Miscellaneous Comments Regarding Audits/Detection	a. Audit initiated after a facility has received a notice of violation, administrative order, or penalty assessment are not voluntary and should not	21

	qualify for policy benefits.	
18. EPA Action in States with Environmental Audit Privilege	b. Policy should give preference to auditing data over CMS data.	21
	a. EPA should recognize (not hinder) state environmental audit/privilege programs.	19
	b. This element of the policy is inappropriate, domineering, and constitutes a substantial intrusion into state activities.	15
19. Economic Benefit Penalty	a. Pollution prevention program should be required for mitigation of economic benefit penalty.	21
	b. Economic benefit must be recouped to maintain level playing field.	28
	c. EPA should not eliminate economic benefit penalty under any circumstances because violations with negligible economic benefit often have significant public safety/awareness purposes.	21
20. Miscellaneous Comments Regarding Public Access to Self-Audit Information	a. All environmental audit and self-evaluation material must be made available to the public.	35
	b. EPA should provide public notice anytime a facility seeks penalty mitigation, and it should publish, at least annually, a list of facilities obtaining mitigated penalties under the policy.	21
21. Clarification of Policy Terms and Conditions	a. EPA should clarify term "serious actual harm" to ensure that all "actual harm" is considered serious.	21

	b. Define “imminent and substantial endangerment”.	16
	c. “Repeat violation” should be defined as a violation involving the same pollutant and process failures as a previous violation.	21
22. Policy Timelines	Policy should require facilities to stop violative activities within a specific time (such as 10 days) after discovery and fully comply with all legal requirements (reporting and correcting) within 60 days.	21
23. Miscellaneous Technical Comments Regarding Policy	a. Facilities should be required to correct all violations identified in any audit, not just those for which they are seeking penalty mitigation. b. Policy should not supersede EPA Enforcement Response Policies (ERP) but should be applied in accordance with ERPs. c. As currently drafted, the use of double negatives places an undue burden of proof on EPA. Policy should require the facilities to show that appropriate measures were taken.	21

## Appendix B

**The Voluntary Environmental Audit Survey of U.S. Business  
Key Findings  
Price-Waterhouse LLP  
March, 1995**

**Among Companies with Environmental Audit Programs:**

1. Across all 14 industrial sectors examined, at least half of each sector's respondents currently perform or contract for some form of auditing.
2. The larger the company (as measured by annual sales or number of employees), the more likely it will audit.
3. Over 90% of the respondents performed audits for good business or proactive reasons.
4. The primary reason for performing audits most often cited (23% of respondents) was to improve the company's overall environmental management program.
5. All together 25 companies (9%) reported that their audit findings had been involuntarily discovered or disclosed. When disclosing audits voluntarily, 31 respondents answered that the findings had been used against them in enforcement actions.
6. The average number of years audit programs had been in place was seven years for the 267 respondents who provided this information. The year programs were initiated ranged from 1968 to 1994, with 1990 as the median year.

**Among Companies Not Performing Environmental Audits:**

1. Out of 91 respondents that did not currently audit, one-third plan to start auditing in the near future.
2. As the primary reason for not auditing, companies most often cited that their processes and products are perceived as having insignificant impact on the environment.
3. Analyzed by industrial sector, the reasons given for not auditing vary significantly. Chemical companies cited that the predominant factor for not auditing was the fear of this information being used against them. This reason was not given at all by the consumer durables sector, which cited most frequently that they had no need to perform audits.
4. Of the respondents that specified resource limitations as their reason for not auditing, 72% of these companies had U.S. sales of less than \$50 million.

### **Factors Encouraging More Auditing:**

1. For companies with auditing programs, the most important factor cited which would encourage them to increase auditing would be if the regulators adopted an enforcement policy which eliminated penalties for self-identified, reported and corrected problems. Two-thirds of respondents picked this reason as an incentive for more audits.
2. Companies have limited resources to perform more audits, despite their desire to do so.

### **Auditing Program Benchmarks:**

1. While approximately one-third of companies with auditing programs evaluate 1 to 5 facilities annually, one-quarter of such companies audit 21 to 50 facilities per year.
2. At a median cost of \$10,000, the direct cost of auditing a facility ranges from \$200 to \$150,000.
3. The annual expense for auditing can be significant, since companies audit many facilities annually (reported average of about 50 over the past two years). The median cost each year was \$120,000, with one report of annual costs of \$4 million.
4. Calculated differently based on reported cost data, the mean number of annual audits is about 40, while the median number is about 12 per year.